CASES

ON

PERSONAL PROPERTY

The following cases have been printed at the request of LEVI T. GRIFFIN, A. M., Fletcher Professor of Law in the University of Michigan, for use in connection with his lectures in that school. They have been compiled by Prof. Griffin with the assistance of Walter Denton Smith, Instructor in Law. They have been selected largely from Adams' Cases on Sales.

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CASES REPORTED.

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HOFFMAN et al. v. CAROW.

(22 Wend. 285.)

Court of Errors of New York. Dec., 1839.

Error from the supreme court. Carow brought an action of trover in the superior court of the city of New York, against Hoffman & Co., auctioneers in the city of Baltimore, in the state of Maryland, for a quantity of merchandise stolen from the plaintiff in the city of New York, and forwarded by the thief to the defendants to be sold at auction. The thief was indicted and convicted of the felony in May, 1833, previous to which time the goods had been sold and the proceeds paid over by the defendants to the thief, without notice of the felony. The suit was commenced in October, 1834, against the defendants, who moved for a nonsuit on the grounds, that the proceeds of the goods having been paid over to the thief previous to his arrest, and before the defendants had notice of the robbery, the plaintiff was not entitled to recover; and that at all events under the circumstances of the case, the plaintiff was bound to prove a demand and refusal. The judge presiding at the trial refused a nonsuit, and charged the jury to find for the plaintiff. The defendants excepted. The jury found a verdict for the plaintiff, upon which judgment having been entered the defendants removed the record into the supreme court, where the judgment of the court below was affirmed. See the opinion delivered by the chief justice (20 Wend. 22). A writ of error was thereupon sued out removing the record into this court.

H. R. Winthrop and D. B. Ogden, for plaintiffs in error. I. Anthon, for defendant in error.

After advisement, the following opinions were delivered:

WALWORTH, Ch. The simple question presented for our decision in this case is, whether the purchaser of stolen goods, who afterwards sells them as his own to a bona fide purchaser, is liable to the owner of the goods, in an action of trover for such conversion thereof to his own use? One of the members of this court, upon the argument, supposed the bare statement of such a case was sufficient to enable the court to decide it without further argument; and I thought so too, until one of the learned and very able counsel for the plaintiffs in error assured us he was sincere in believing the action could not be sustained, and referred to a case from the English Term Reports which was apparently a decision in favor of his clients. To understand that case, therefore, and to distinguish it from the present, I have found it necessary to bestow a little more time upon the examination of this subject than I should have otherwise deemed it my duty to give to it.

It is known to the professional members of the court, that in the market towns in England there are periodical fairs, where property is bought and sold, called market days; and that by the custom of the city of London, every day except Sunday is a market day, and every tradesman's shop is a market overt for those things in which he usually deals at that place; and that by the common law, a sale in a market overt actually changes the title to the property in favor of a bona fide purchaser thereof, even though it has been stolen from the rightful owner. 5 Coke, 83a. The only remedy of the owner of stolen property to recover it again, under such circumstances, at the common law, was to pursue his appeal against the felon to conviction, and then he was entitled to restitution of his goods, although they had been sold in a market overt. 2 Co. Inst. 714. So, also, if goods were stolen, and the thief abandoned or waived them in his flight, they were forfeited to the crown, or the lord of the manor, unless the owner proceeded upon his appeal to attaint the thief. Foxley's Case, 5 Coke, 109a. But as this proceeding to convict the felon by a private suit was very inconvenient and expensive to the owner of stolen property, the statute 21 Hen. VIII. c. 11, was enacted, by which the stolen goods were directed to be restored to the owner upon his procuring a conviction of the thief, upon an indictment in the ordinary way, without the necessity of an appeal. Staunf. P. C. (Ed. 1583) p. 167. Under this statute, it is the settled law in England, that upon the conviction of the offender, the owner is entitled to be restored to his property, notwithstanding it may have been sold to a bona fide purchaser in a market overt. Burgess v. Coney, Trem. P. C. 315; 2 Co. Inst. 714; J. Kel. 48.

In the case of Horwood v. Smith, 2 Term R. 750, relied on by the counsel for the plaintiffs in error to show that they could not be liable for a conversion of these goods which took place before the conviction of the thief in May, 1833, there had been an actual sale of the stolen property to Smith, the defendant, in a market overt. The title of the owner was therefore absolutely divested by this sale, so that Smith, the defendant, could not be guilty of a conversion as to him, by afterwards selling the sheep to another person, before the plaintiffs' right to the property had been restored by a conviction of the felon. By a reference to the opinion of Mr. Justice Buller in that case, it will be seen that he puts the decision upon that ground; and the language put by the reporter into the mouth of Lord Kenyon, that the title to the stolen property was in dubio previous to the sale to the defendant in the market overt, I shall presently show is not considered as law, even in England. The case under consideration, therefore, differs from Horwood v. Smith in this: that there had been a sale in market overt in that case previous to the alleged conversion, and the title which Smith acquired by that sale was not divested by the subsequent conviction until long afterwards,

which conviction was considered as giving the original owner a new title to the property; whereas, in the present case, there never had been any sale in a market overt, to convey any title to the defendants which required to be divested by a conviction. Whether there are any markets overt in Maryland, where the defendants purchased this property from the thief, I do not know; but if there are, there was no attempt to prove on the trial that they purchased the property in a market overt; and the learned Judge Blackstone, "the English Justinian," says, in so many words, that "if my goods are stolen from me and sold out of market overt, my property is not altered and I may take them wherever I find them." 2 Bl. Comm. 449. See, also, Foxley's Case, 5 Coke, 109a; and Kelh. Laws of William the Conqueror, 73, law 44.

The case of Parker v. Patrick, 5 Term R. 175, depends upon an entirely different principle. The goods in that case were obtained by fraud and not by felony. The sale to the fraudulent vendee was, therefore, not void, but only voidable at the election of the vendor; and as the vendee had pawned them to an innocent person for a valuable consideration, the pawnee was permitted to hold them as against the owner who had enabled the vendee to obtain property of the defendant, upon the security of property which had apparently been sold to the pawnor, so as to give him the legal title thereto. Morey v. Walsh, in our supreme court (8 Cow. 238), was decided in favor of the bona fide purchaser from a fraudulent vendee, upon the same principle; although it will be seen the chief justice said in that case, that in this state where we had no markets overt, a sale of stolen goods would not divest the title of the owner. The same distinction between the cases of goods obtained by fraud and goods obtained by felony, is noticed by Lord Denman in Peer v. Humphrey, 1 Har. & W. 28, which is also a direct authority in favor of sustaining the judgment of the supreme court in the present case. Indeed, it is a case upon all fours with this, and makes the distinction, which I have been endeavoring to explain, between Horwood v. Smith, and the case which we are now to decide. The servant of the plaintiff stole three oxen and a heifer from him and sold the three oxen to the defendant for cash, but the sale was not in a market overt; the thief was afterwards taken and convicted, but before that conviction the defendant had sold the cattle to other persons. After the conviction of the thief the plaintiff brought his action of trover against the defendant, for the previous conversion, as in this case, and recovered the value of the cattle. Upon the case being brought before the court of king's bench, the counsel for the defendant cited Horwood v. Smith, and referred to what Lord Kenyon said as to the property being in dubio between the felony and the conviction. To which Lord C. J. Denman replied "that must be a mistake, or the consequence of the judgment having been delivered hastily," and in giving his opinion afterwards, he said that in the case then under consideration the property in the cattle never was divested out of the true owner; but that a sale in market overt gave a prima facie right of property. Justice Littledale says, "as the defendant did not purchase in market overt, he acquired no title whatever in the cattle; that remained in the plaintiff, and therefore the defendant's subsequent sale of them, amounted to an act of conversion." And Justice Williams said that Horwood v. Smith merely laid down that a party by purchasing in market overt acquired a property in the thing stolen; but as the purchase in the case they were then considering was not such a sale, no property passed to the defendant in point of law and was never divested out of the plaintiff. The verdict therefore was directed to stand. It appears by this case, and also by that of Gainson v. Woodfull, 2 Car. & P. 41, that the courts in England will not sustain a suit in favor of the owner of the stolen property, either against the thief or against a purchaser from him, until he has proceeded criminally against the thief for the felony. This practice undoubtedly proceeds upon the ancient common law principle that the civil injury is merged in the felony; but as the Revised Statutes of 1801, which abolished appeals of felony in this state, also declared that the civil remedy should not be merged in the felony, or in any manner affected thereby, this English rule does not apply to suits commenced here. 1 R. L. 1801, p. 264. In the present case, however, the plaintiff had convicted the thief before the commencement of his suit. He was therefore entitled to recover according to the English practice.

I have no doubt that the decision of the court below, was correct; and the judgment should be affirmed.

By Senator EDWARDS. In this case it is clearly shown that Carow had the title to the property. This title he could not be divested of, but by his own consent or by the operation of law. He did not consent to part with the property because it was stolen from him, and the question is, has he been divested of it by the operation of law since the felony.

The sale of the property at public auction could not divest the owner of his rights. No one can transfer to another a greater interest in personal property, than he or the principal for whom he acts, possesses. This is one of the fundamental principles by which the right to personal property is tested in cases of sale, and is of great antiquity. "Nemo plus juris in alium transferre potest, quam ipse habet," was considered a sound and salutary principle of the civil law in France and Scotland, even in the time of

Pothier and Erskine;* and although England has departed from it in one instance in the law of market overt, yet that law has never been adopted in this country, and whenever the question has been presented to American judicial tribunals it has been repudiated. Wheelright v. De Peyster, 1 Johns. 480; Dame v. Baldwin, 8 Mass. 518; 1 Yeates, 478; 2 Kent, Comm. 324. As to the question therefore under consideration, it is wholly immaterial whether the property be sold at public auction by an auctioneer or at private sale by any other individual; the owner's rights cannot be affected in the one case more than in the other, nor can the purchaser acquire any greater interest in the one case than in the other. Disposing of or assuming to dispose of another's property without his consent, unless by the operation of law, is a conversion for which this action lies. Everett v. Coffin, 6 Wend. 609; 4 Maule & S. 259; McCombie v. Davis, 6 East, 538; Parker v. Godin, 2 Strange, 813; Wilbraham v. Snow, 2 Saund, 47; 2 Phil. Ev. 121. Nor can even a bona fide purchaser protect himself under such a sale. The doctrine of caveat emptor applies, and he is liable to the action of trover by the real owner, notwithstanding his purchase. Williams v. Merle, 11 Wend. 180; Prescot v. De Forest, 16 Johns. 160. Were the rule as contended for by the counsel for the plaintiffs in error, all the felon would have to do to divest the owner of the right to his property, would be to place it in the hands of an auctioneer as soon as stolen, and cause a sale to be made of it; a rule of law that would thus encourage felony and deprive the owner of his property, would be as absurd as unjust.

When property is taken without legal authority or the consent of the owner, it is unnecessary for him to make demand before action brought. When he has once consented to part with the possession, in some cases it is necessary to made a demand to show a conversion, but when the possession is wrongfully taken, there is a conversion and no demand is necessary.

The Revised Statutes have not altered the nature of this action in a case like the one we are now considering, as the counsel would seem to suppose from his argument. The statute is intended to make provision relative to stolen property, where it has been arrested from the felon, and is in the custody of some legal officer, but does not extend to a case where the felon has delivered the property to an auctioneer to make sale of it for his benefit. I am therefore for affirming the judgment.

By Senator FURMAN. No case like the present has ever been decided by this court; and it is of the utmost consequence that an adjudication, having the important bearing that this promises to exercise upon the commercial interests of our country, should not be determined until after a patient investigation of the principle in all its bearings, and a due examination of the adjudged cases under which the doctrine is sought to be established, and of the facts and circumstances under which they were decided.

The principle rests in the common law, that a felon does not acquire any title to the goods stolen, that he cannot transfer title even to a bona fide purchaser, and that the owner may take his goods which have been so stolen wherever he can find them. But it was very early discovered, that the commercial interests of the English nation required that some exception should be made to this general rule, and it was for that purpose that the courts in that kingdom held that the principle did not apply to sales made in market overt; and that sales made under such circumstances should convey a title to the bona fide purchaser, although the property might have been stolen. Even this exception was not found sufficiently broad to meet the wants of a trading community, in which it is absolutely necessary, for the well being of society, that a bona fide purchaser should be protected in his possession of personal property; and the exception was still further extended to sales made in public shops in the city of London. It is well to remark here, that in England such markets overt are held, either by prescription or by charter, and in no instance does the charter declare that sales made therein shall be conclusive; but the doctrine has arisen from the exigencies of trade, and has been adopted with a view to protect and favor the commercial interests of that country. But it is said by our courts, and with truth, that the principle of sales in market overt, as it exists in England, has no application to this country. Although this is admitted, yet I may be allowed to express my surprize, that, with our trade and commerce, we should have no similar doctrines or principles to protect it, but that, on the contrary, we should seek to establish a rule which governed England in the infancy of its commerce, which was adopted by its courts at a period when it had no manufactures, and its whole trade consisted in raising wool and exporting it to Flanders to be wrought into cloth, and which was repudiated by those courts at a period when the commercial relations of that country were not of one quarter the importance or value of those of our own country at the present time. My surprize has not been diminished, when I find that almost every commercial nation, ancient as well as modern, beside our own, had found it necessary to adopt some such doctrine. It was wisely provided by the laws of Athens, that all lawsuits relating to commerce should be carried on in the six months during which ships were not accustomed to put to sea, to the end that they might not lose their voyage by the impediment of legal prosecutions. On the contrary, we, although depending on foreign

commerce for our prosperity to a much greater extent than ever the inhabitants of that ancient state did, hold a mere commercial agent liable in damages, at any time within six years, for an act honestly done by him in the course of business, and that even without a previous demand before the suit is instituted. In the Roman state, Ulpian speaks of the great privileges granted by the government to merchants, and gives for it the general reason, because navigation is of the greatest service to the state.

In England, the plaintiff could not recover merely because the goods had been stolen, without that fact having been first judicially ascertained. Before the statute of the 21 Hen. VIII., the owner was not entitled to a restitution of the stolen property, even upon the conviction of the felon on indictment, but could only obtain the same by prosecuting an appeal. After the enactment of that statute, appeals were disused, and were rendered unnecessary, because the court might, on the conviction of the felon, award restitution; and the courts are now in the habit of doing so. Our own statute (2 Rev. St. 747, § 33) adopts the English statute on that point. In England, the action under the award of restitution cannot be maintained against any one except him who shall be in possession at the time of the conviction or attainder; and a demand is also requisite before the action is brought. 6 Mod. 412. The reasonable inference from this statute, and the manner of proceeding, seems to be that in the case of stolen property, the title of the plaintiff, so far at least as to enable him to maintain trover, is not established before the conviction or attainder; at any rate, he is not before then entitled to a restitution under the statute. 2 Car. & P. 41, and note. It does not appear from this case, that the felon was convicted of the felony charged before this suit was brought; but it does appear that the proceeds of the sale of the goods in question were paid over to him before he was even arrested. Our statute does not authorize the plaintiff to recover his goods from any one who may at any time have had the goods in his possession, but merely authorizes a recovery in general terms. The statute (2 Rev. St. 717, § 31) seems to recognize the principle, that under certain circumstances, although the property has been stolen, a good title may be conveyed by a person not the owner, or at the least, a title sufficient to protect a bona fide purchaser from an action of trover, for that section provides, that "If stolen property shall not be claimed by the owner thereof before the expiration of six months from the time any person shall have been convicted of stealing such property, the magistrate, sheriff, constable, or other officer, or person having the same in his custody, shall deliver such property to the county superintendents of the poor, on being paid the reasonable and necessary expenses incurred in the preservation thereof, to be appropriated to the use of the poor of such county." This enactment is made notwithstanding that by the general law of the land, the owner is entitled to six years within which to bring his action; and certainly the legislature cannot be presumed to have intended to authorize an illegal disposition of another's property.

But there is a stronger and more express exception to this general principle, which is to be found in the case of negotiable bills of exchange and promissory notes, where possession is prima facie evidence of property, and a bona fide holder can recover upon the same, although a bill or note came to him from a person who had stolen or robbed it from the owner, provided the bona fide holder took it innocently in the course of trade for a valuable consideration, and under circumstances of due caution. Suspicion must first be cast upon the title of the holder, by showing that the paper had got into circulation by force or fraud, before the burden is thrown upon him of showing how he came by it, and what consideration he gave for it. This protection is, for the sake of trade, given to the holder of negotiable paper, who receives it fairly in the way of business; and why the same principle should not be applied to other personal property which passes through the hands of an individual fairly, in the course of trade and without notice, is difficult to imagine. If Lord Mansfield, with his clear and comprehensive mind, felt himself called upon, ex necessitate rei, to depart from the common law, and to establish the principle above stated in the case of negotiable commercial paper, it cannot for a moment be doubted, that if the judges who preceded him had not deemed it necessary to protect the innocent bona fide purchaser, by the doctrine of sales in market overt, that the great founder of English commercial law would have extended the same principle to all other property the subject of mercantile transaction.

It is the boast of the common law, that it accommodates itself to the growing wants of a thriving commercial people; and it has not been in bravado merely, that this has been put forth; but in the hands of the venerated sages of the English bench, it has been practically applied. What did the age of Henry VIII., when the "Great Abridgement of the Statutes of the Realm" formed a single volume but little larger than a pocket Bible, know of the law of bills of exchange and promissory notes, or of the law of insurance and shipping? Nothing. All this, and a thousand fold more, has been engrafted upon it by judicial legislation, until it has truly become the collected wisdom of ages. "Ita lex scripta est" was not regarded by those sages, as it is too much the case in our day, a sufficient answer to an argument

however cogent, for the establishing a new principle arising from the wants of the community; but with them it advanced and expanded to meet those wants. A tame subserviency to precedent would have prevented all the improvements in that body of law, which have been the means of rendering it the admiration of the world; and we have great cause for thankfulness, that such was not the course pursued in the country from which we have derived our institutions as well as our law.

On the part of the defendant in error, it is contended that the goods in question having been stolen, the delivery conferred no authority on the plaintiffs in error to sell them; that such sale was a conversion; and that the payment of the proceeds to the felon, although without notice or knowledge of the felony, does not discharge the plaintiffs in error from responsibility to the right owner, who it is insisted has a right to reclaim his property, and to hold any one responsible who has assumed the right to dispose of it; and that the fact of the plaintiffs in error being auctioneers does not vary their responsibility. On the argument of these points a number of authorities were cited; in the examination of which a short time may not be unprofitably spent in order to ascertain what were the facts and reasons which led to their decision. Among the cases on which the counsel for the defendant in error relies to sustain the recovery against the plaintiffs in error, is that of Peer v. Humphrey, 2 Adol. & E. 500, in which the property was stolen and sold to the defendant who was a bona fide purchaser. Two days after the sale, the plaintiff having discovered his property in the defendant's possession gave him notice that it had been stolen from him, and demanded possession, which was refused. Three months after this notice and demand, the defendant sold the property in market overt and appropriated the proceeds to his own use. The thief was convicted of the felony on the prosecution of the plaintiff; and afterwards, the plaintiff brought an action of trover and recovered against the defendant. Here it will be noted that the property having been sold by the defendant in market overt, the plaintiff could not follow it up, and could not recover of any other person than the defendant. No one, however, would feel much reluctance in sustaining such a judgment, for the defendant was possessed of the property at the time of the demand, and disposed of it three months after he had received notice that it had been stolen. So if the auctioneers in this case had sold the goods of Carow, after they had notice of the felony, and after he had demanded the goods from them, and had then paid over the money to the felon, it would be a parallel case with that cited.

The next case is that of Stephens v. Elwall, 4 Maule & S. 259. That was trover. The plaintiffs were the assignees of a bankrupt, who being possessed of the goods in question, sold them after his bankruptcy to one Deane, to be paid by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of his house. The goods were delivered to the defendant, who sent them to Heathcote in America. A demand was made on the defendant before suit brought, but not until after the expiration of nearly two years from the purchase. The defendant was held liable. It is not difficult to see that this case rests mainly upon the principles governing bankruptcy cases in England. In that case, Potter v. Starkie (decided in England in 1807) is cited, and is also referred to by the counsel for the defendant in error. There the court held the sheriff liable in trover although he had seized, sold and paid over the money before the commission of bankruptcy issued, and before notice, but after the bankrupt had committed the act of bankruptcy. The courts in England have in all these bankrupt cases invariably, held the doctrine, that after an act of bankruptcy, the bankrupt cannot by sale pass the title to any of his goods or property, or in any way divert the same from the satisfaction of his just debts; and that from that moment, the property belongs to his assignees to be appointed under the commission. This doctrine forms a part of the policy of the commercial law of England; and arises from the fostering and protecting care which the courts of that nation exercise over their commercial interests. It is based upon the same principles which have induced the courts to sustain the exception in favor of sales in markets overt, and the peculiar custom as to sales in public shops in the city of London.

The case of Cooper v. Chitty, 1 Burrows, 20, is another of these bankrupt cases, and was trover brought by the assignees of Johns, a bankrupt, against the sheriffs of London, who had seized and sold goods in the possession of the bankrupt under a fi. fa. The facts were these: Johns committed the act of bankruptcy Dec. 4, 1753. Dec. 8, he was declared a bankrupt and the commission issued; and on the same day, the assignment was made. Twenty days after, the sheriffs sold the goods on a judgment recovered against Johns after the act of bankruptcy was committed. It is difficult to see what question there could be about this case; and in the decision of it, Lord Mansfield says, it is admitted that the property was by relation in the plaintiffs as and from the 4th of December (which was before the seizure by the sheriffs, and in fact before the judgment was recovered), that this relation, by the statutes concerning bankrupts, was introduced to avoid frauds. And the court held the defendants liable, on the ground that the conversion was twenty days after the assignment, and that the sheriffs ought

not to go on to a sale after a full discovery that the goods belonged to a third person. This principle I agree should be held applicable to the cases of stolen property. A party should be held liable if after a full discovery that the goods belonged to a third person he proceeds to a sale; but not otherwise.

As to these bankrupt cases, it was very early found necessary in governments which authorized personal arrest and imprisonment for debt, to interpose and provide relief to the debtor in cases of inevitable misfortune; and this has been especially the case in respect to insolvent merchants, who are obliged by the habits, the pursuits, and the enterprising nature of trade, to give and receive credit, and to encounter extraordinary hazards. Thus we find the cessio bonorum, or cessio miserabilis, was established at Rome, by the Julian law; and when a person applied for the benefit of that law, the creditors had their election either to grant to the insolvent a letter of license for five years, or to take a general assignment of all his property, on condition that he should not be imprisoned—a provision creditable to the general intelligence of that early period; and one better adapted to the exigencies of a commercial nation than the laws now existing either in England or this country. Bankrupt and insolvent laws are designed to secure the application of the effects of the debtor to the payment of his debts, and then to relieve him from the weight of them. Under these laws the title of the bankrupt to the remnants of his property, becomes absolutely vested in the assignees. These laws are in the nature of a contract between the government and the mercantile portion of the community, that if, in the event of misfortune, they will surrender all their property and effects to the satisfaction of their creditors, the government will discharge them from the penalty consequent upon their failure to meet their engagements, and it is the duty of the courts to see that it is rigidly complied with on the part of the bankrupt debtor. But the principles which the courts in England have found it necessary to adopt, in order to oblige a bona fide application of all the effects of the bankrupt to that object, cannot reasonably be extended beyond that class of cases, for the purpose of deciding others which rest upon different principles.

Having thus gone through with an examination of the English cases cited and relied upon by the counsel for the defendant in error, to sustain the judgment below, it is seen that in all of them are to be found facts which induce us to yield our assent to their decision. In each of them we discover that notice of the state of the case was brought home to the defendant while he remained in the possession of the property in dispute; and in all of them we find that a demand was made before suit brought. Among those cases, three of them, viz. that of 4 Maule & S. 259, that of Potter, v. Starkie (also cited in that volume), and that of 1 Burrows, 20, are cases decided upon the peculiar principles which govern the bankrupt laws of England; and there is but one case, that of 2 Adol. & E. 500, which is similar to that in question, and the facts which it appears it was deemed necessary to prove in that case to warrant a recovery, go far to sustain some of the objections taken here by the plaintiffs in error against this judgment. The result is, that I do not find that any of those cases carry the doctrine sought to be enforced by the defendant in error, to the extent to which it has been carried by the decision of the supreme court in the present case. It is now necessary to make a similar examination of the cases in our own courts in order to see in what light they view this principle deducible from the common law.

The first of our own decisions by the supreme court, cited by the counsel in support of the doctrine laid down by the court in this case, is that of Everett v. Coffin, 6 Wend. 603. The facts in that case were, that Collins, the master of the brig Dove, at New Orleans, signed a bill of lading that Bridge & Vose had shipped in her for New York, 179 pigs of lead, to be delivered to Tufts, Eveleth & Burrell, or their assigns, on paying freight. A letter was in evidence, showing that it was shipped on account and risk of Otis Everett, of Boston. The brig arrived in distress at Norfolk, a portion of the lead was sold to pay expenses, and the balance was transferred to the schooner Dusty Miller, for New York, a bill of lading was taken to deliver the property to Captain Collins, (which was undoubtedly with a view to secure the freight and expenses,) and the captain of the schooner, by order of Collins, delivered the same to the defendants. Tufts, one of the original consignees, called on the defendants, who shewed him the bill of lading from Norfolk, made to Collins, and endorsed by him to the defendants, and told him that the lead had come to hand, and had been sold and the money received; that the contract of sale was made by Collins; that the defendants had become responsible for the freight and average and had advanced money to Collins. It does not appear from the case, that they had ever accounted with Collins and paid over to him the balance after satisfying their responsibilities and claim; but the inference is, that they had the whole proceeds of the sale then in their possession, or had appropriated the same to their own use. The circuit judge nonsuited the plaintiff. The questions argued by the counsel in the supreme court were, whether the plaintiff had sufficiently proved his right to the property to maintain the action; and, whether the defendants had a lien upon the same, and could retain it for the satisfaction of that lien. The court, by Justice Suther-

land, in deciding the case, held, that the evidence of the right, and the demand and refusal was sufficient; that Tufts, one of the original consignees, had full legal authority to do all that he did; and also, that the defendants had a lien on the property, which should have been paid or tendered before the suit was commenced; that the plaintiff's right of action was not complete until the lien was satisfied; and the court conclude by deciding that the plaintiff was properly nonsuited. This, in fact, decides the whole case, and every question that could be properly raised, or was raised, as appears from the report. There is no pretence that the property was feloniously taken from the plaintiff, for there is no principle better settled than that without an express agreement, the master of a ship is not bound to part with the goods until the freight be paid; and if the regulations of the revenue require the goods to be landed and deposited in a public warehouse, the master may enter them in his own name, and thus preserve his own or his owner's lien. In that case the defendants, by the assignment of the last bill of lading, stood in the place of the master; and the same rule also applies to the average on the loss. The court, however, proceed to lay down some general principles, which they were not necessarily called upon to do by any of the facts or circumstances in that case, as they appear by the report of it; and they say that "the disposing or assuming to dispose of another man's goods, without his authority, is the gist of this action; and it is no answer for the defendants that they acted under instructions from another, who had himself no authority,"—and cite in support of that position the cases of 4 Maule & S. 259, and 1 Burrows, 20, which have been before examined and the bearing of them shewn. There is no doubt that the law as laid down by the supreme court, as to disposing of the goods or property of another, without authority, is correct; but in that case the defendants had authority to hold possession of the property under a lien. It is, however, but a general principle; and like all other general rules or principles has exceptions, which I have before adverted to. Every case attempted to be brought under it must depend upon its own peculiar state of facts as the same came out in proof, to ascertain whether it belongs to the rule, or attaches to one of the exceptions. That dictum, however, which is incidentally mentioned in the course of the opinion of the court, together with a similar one in 8 Cow. 238, which was in a case of fraud, and not of felony, seem to have formed the basis of the subsequent decisions of that tribunal. And the next succeeding case is the first one that applies that principle in its broadest sense to the facts of the case.

In Williams v. Merle, 11 Wend. 80, the facts were these: November 1, 1829, the master of a tow-boat, by mistake, took 4 barrels of potashes from a warehouse in Albany, and discovering his mistake when in New York, delivered them to the clerk of the agents of his principals, who took them to an inspector's office on the 3d of November following, obtained a certificate of inspection, and on the 6th of the same month sold them to the defendant, a produce broker, who purchased them for a Mr. Patterson, at a fair price, and received the inspector's certificate. On the 10th of November, the defendant took the ashes from the inspector's office, and shipped them to the order of his principal. About the 1st of September, in the following year, the plaintiffs demanded the ashes of the defendant, who refused to account for them, saying he had purchased and paid for them a year preceding the demand. The circuit judge, Edwards, intimated his opinion, that if the defendant had acquired the property bona fide by purchase, in the regular course of his business as a produce broker, and had disposed of the same bona fide, pursuant to the instructions of his principal, before suit brought, the action would not lie. He, however, refused to nonsuit the plaintiffs, and the jury, under his direction, found a verdict for the plaintiffs for the value of the ashes, and interest. The case was brought to the supreme court for revision; and that court, in following up the general principles mentioned in the cases of Mowry v. Walsh, and of Everett v. Coffin, decided that the defendant was liable, and that the owner of property cannot be divested of it but by his own consent, or by operation of law, and that the purchaser acquired no title. The circuit judge took such a view of the facts and of the legal principles which should be applied to them, as seems to commend itself to our common sense of justice; and such an one as the equity of the case would seem to require—which was to leave the plaintiffs to their remedy against those who actually converted and sold their property, and had appropriated the proceeds to their own use; but not allow them to sustain an action against an innocent party who was only the agent for the purpose of transmitting the property from the hands of those who had so converted it, to those of a third person. Not that there was any doubt about the general rule of law, as laid down by the court in reviewing the case; but because the defendant was in a business well known to the commercial community as an agent, a produce broker, transacting that business bona fide; and because the great and important interests of the community required that those men should not be rendered liable in damages for acts done by them without the intent of committing a violation of law. The reasonable presumption would be, that if such a doctrine should be sanctioned by the higher courts, and thus become the settled law of the land, these agencies would

be broken up, to the great annoyance and expense, as well of the merchants as of the planters; thus affecting not only the commerce but the agriculture of the country; or at the least be the cause of creating very serious impediments in the way of the transaction of that business which has been for several years past peculiarly appropriated by that class of men; and which constitutes a very large amount of the whole business of the country. The only ground upon which a party should be held liable, is that he has the property or its value in his possession, or has with knowledge or under notice, illegally disposed of it; and not by reason of having been the mere conduit for its transmission from one to another, and that without notice or knowledge of any claim having been set up to the property by a third person. I am inclined to think there is a slight mistake in the case as reported in relation to the doctrine held by the circuit judge; in which he is made to intimate that if the defendant had, in addition to the other circumstances by him stated, "disposed of the property bona fide, pursuant to the instructions of his principal before suit brought, the action would not lie;" and that he intended to have been understood as intimating, that if the defendant had in addition to those other circumstances, disposed of the property bona fide, pursuant to the instructions of his principal before notice, or demand made, the action would not lie. That would make the doctrine conform to that deducible from the English cases, and to what I believe to have been the law in this state before the case of Mowry v. Walsh, 8 Cow. 238, which was decided in 1828, although I cannot see that the decision of that case, viewed in a proper light, militates against that rule.

This disposes of the adjudged cases cited on the argument of this cause—there are however two cases referred to by the learned chief justice in delivering the opinion of the supreme court, which should here be noticed. The first is that of Mowry v. Walsh, above mentioned. There goods were obtained from the plaintiffs by means of a forged recommendation, and a promise to pay whatever amount the plaintiffs might let him have. After thus obtaining the goods, the party obtaining the goods, took them to Lansingburgh, and sold them to the defendant for considerable less than the prices which had been charged him by the plaintiffs, at the factory. The defendant's clerk however, testified that the price paid was a fair one. The plaintiffs afterwards demanded the goods, and the defendant refused to surrender them and an action of trover was brought. The circuit judge held that the goods were obtained fraudulently but not feloniously, and the defendant having bought them bona fide without notice of the fraud, the plaintiffs could not recover; and a verdict was rendered for the defendant. The case was brought before the supreme court, and that court supported the decision of the circuit judge, and held that it was a case of fraud, and not of felony or larceny, and that the finding of the jury and the testimony established the fact that the defendant purchased without notice of the fraud; that although as between the original parties to the contract, the sale was void in consequence of the fraud, yet if that original fraudulent purchaser afterwards sold the goods to a bona fide purchaser without notice of the fraud, the property passed, and the court would protect him in the possession thereof. Although this decides the whole case which was brought up for examination, the court also lay down the general principles of law as applicable to cases of stolen property—that if the goods were taken feloniously no title passed from the owners and they might pursue and take their property wherever found; that such is the law in England unless the goods are sold fairly in market overt, and that having no such market here, the sale can have no other effect than mere private sales in England. In deciding the case last mentioned, the supreme court cite that of Parker v. Patrick, 5 Term R. 718, as being in favor of the defendant; which is the same case cited by the counsel for the plaintiffs in error on the argument of the question. In Parker v. Patrick, the goods had been fraudulently obtained of the defendant and pawned to the plaintiff for a valuable consideration, without notice of the fraud. After the conviction of the offender, the defendant obtained possession of his goods, but by what means does not appear. The plaintiff brought an action for their recovery, and it was contended that he, although an innocent pawnee, could not recover, as he derived title through a fraud, and was like a person deriving title from a felon. But Lord Kenyon thought the cases distinguishable, and the plaintiff had a verdict. A motion to set aside the verdict was denied, and the court held that the statute of 21 Hen. VIII. c. 21, did not extend to cases of fraud, but only to a felonious taking. By that statute the owner of stolen property was entitled to restitution upon the conviction of the felon. But as that statute did not apply to a fraudulent obtaining of goods, the owner was not entitled to restitution—and the question was then, say our supreme court in commenting upon that case, purely at common law, and the innocent pawnee was allowed to recover against the owner. Although in the statement of that case it is said that it does not appear by what means the defendant obtained the possession of the goods, yet I think it is evident from the opinion of the court that the offender was prosecuted for the fraud and convicted; and that thereupon the court before whom he was tried, awarded restitution to the owner, and this view of the case becomes the more important, because the main question to which the attention of the king's bench seems to have been called,

was whether the statute of 21 Hen. VIII. extended to the case of goods obtained by fraud, so that restitution might be awarded to the owner upon conviction; for if it did not, then the defendant had no right to the possession, and it was still in the plaintiff to whom they had been pawned. For this reason it appears to me that the case is of little weight in settling the question on either side.

It is insisted by the plaintiffs in error, that the same principles should apply equally to the cases of property obtained by fraud or felony, so far as innocent parties are concerned, and that the statute merging the civil action in the felony only applies as between the felon and the original owner of the property, and not to third persons. The courts, however, in England and in this country, have thought they saw some reasonable distinction between those cases; and that the doctrine relating to the fraudulent acquisition of property, was not applicable to the felonious taking of it. But recently, in the English court of common pleas, in the case of Samplin v. Addy, Chief Justice Best virtually held that no such distinction existed. Our supreme court in adverting to that case in Mowry v. Walsh, 8 Cow. 240, think the opinion of Chief Justice Best, "certainly at variance with the settled principles of law." This shows at least, that there is a difference of opinion among sound lawyers on that point; and I must confess that it appears to my mind very difficult to draw a satisfactory distinction between the two cases: either the original owner should be entitled to his property in both, or an innocent vendee or party should be protected as well in the one instance as the other.

The other case cited by the chief justice, is that of Andrew v. Dieterich, 14 Wend. 32, decided in 1835; and is the first case in which the question as to the felonious acquisition of property came directly before the court. It was an action of replevin. The facts were, that one Simmons purchased of the plaintiff a quantity of carpeting, for which he was to pay cash as soon as it was measured and the quantity ascertained; it was sent to him; after which, instead of paying for it, he absconded. Previous to absconding, he applied to the defendant who was an auctioneer of household furniture to sell his furniture, and obtained on it an advance of $350, and gave the key of his house to the defendant. After the carpeting had been three weeks on the floor of the house, the defendant removed it and the other things to his auction room. The plaintiff demanded it, and the defendant refused to deliver it up unless his lien was discharged, upon which the suit was brought. Justice Oakley, of the superior court, on the trial, charged the jury that the defendant was entitled to a verdict, if they found there had been a complete delivery of the property by the plaintiff to Simmons; and that when the defendant made the advance and took possession of it by way of pledge he was ignorant of any circumstances which ought to have put him on his guard as to the manner in which Simmons had obtained it from the plaintiff; and that if they found such a delivery by the plaintiff to Simmons, the plaintiff could not recover on the ground that the property had been feloniously obtained. The jury found for the defendant. By this charge, the law was given to the jury, and they passed upon it, as it had been understood to have been settled by the previous decisions. But the cause having been brought to the supreme court, on exceptions taken to the judge's charge, that court reversed the judgment on the ground that the goods were obtained under false pretences, which was made felony by statute. This was one of the first cases decided under that law for converting civil remedies into criminal prosecutions, the effect of which was to convict a man of a felony in the eye of the world in a civil action, to which he was not a party, and where he had no opportunity of making his defence. The extension of this questionable policy so much at variance with the common law which holds every man innocent until legally convicted, shows the necessity of coming back to the principle of the English courts, and of requiring a conviction of the offender before the prosecution of these civil remedies should be permitted, much less encouraged. In giving their opinion, the supreme court to some extent affirm the law as it was before held, and say that "a fraudulent purchaser acquires no title as against the seller, but as possession is prima facie evidence of property, where the vendor has delivered possession of his goods with intent not only that the possession, but the property shall pass, a bona fide purchaser from a fraudulent vendee shall hold the goods in preference to the owner." With all due deference to the opinion of the able judges of that court, I have understood the law to be a little different from that by them stated; that as between the original owner of the goods, and a subsequent bona fide purchaser from a fraudulent vendee, it is not made a question whether the owner delivered the goods with the intent that the possession or the property should pass; and that in cases where the delivery was merely conditional as between the original parties to the contract, as where the payment is to be made simultaneously with the delivery, but is omitted or evaded by the purchaser on obtaining the delivery of the goods, although there the delivery is merely conditional, and the non-payment is an act of fraud entering into the original agreement, and rendering the whole contract void as between the buyer and the seller, yet as to a subsequent innocent purchaser from that vendee, it is not so; for if the owner indiscreetly parts with the possession to the vendee, he cannot afterwards reclaim the goods to the prejudice of the rights of subsequent bona fide pur-

chasers or creditors of his debtor; for where one or the other of innocent persons must suffer, the law imposes the penalty upon him by whose fault the necessity exists.

An auctioneer, does not claim the goods as his own, or assume any right in or over or to dispose of the same as his own property. It is true he has a special interest in goods sent to him to be sold, and a lien on them, or their proceeds, for the charges of sale, his commission, and the auction duty payable to the state; he may sue the buyer for the purchase money; and is responsible to the vendee for the fulfilment of the contract of sale unless he discloses the name of his principal at the time of sale; yet, for all other purposes, he is the mere agent for the transmission of goods from one set of traders to another. It appears to me unjust to charge him with the value of the goods sold in a case like the present; though I admit that if he had received notice that the property he was about to sell did not belong to his principal, and notwithstanding such notice he proceeded to sell, he ought to be held responsible to the real owner for the value of the property, or the amount of sales, as such owner might elect. In criminal cases it is the scienter, or the intent, which constitutes the crime; and can it be just or equitable in a civil action to place an innocent man, an agent, one who is admitted to have acted without knowledge or evil intent, in a worse situation than one who is arraigned for a criminal violation of the laws of his country? And to excuse the one from punishment if he has unwittingly or unintentionally violated those laws; and at the same time to mulct in damages the other for a technical illegal taking of another's property. It is not the fact that the law regards the intent only in strictly criminal cases, for the question of fraud at the common law depends upon the motive. So if a person buys goods of another against whom he knows there is a judgment, and does not do it to defeat a creditor's execution, it will not affect his purchase.

All the cited cases, and which I have previously examined, show that there was a demand made before suit brought. In this case, it is not pretended that before this suit was instituted there was any demand whatever made, the claimant resting alone upon the legal principle that the sale was a conversion. I am satisfied, however, that a formal demand should have been made on these auctioneers before this suit was brought; and that it should never be permitted that a person who comes innocently into the mere custody of property, without claiming any title to it in his own right, and who by virtue of a public office conferred upon him by the government of the country acts merely as agent for the sale of that property, and is known as such to the world, should be held liable to respond in damages to the person who may afterwards prove to be the owner, without having at least the opportunity of settling with his adversary, or of paying the amount claimed without being charged with the additional penalty of the costs of a suit.

I am still further satisfied, even allowing for the sake of argument that such formal demand had been made, that the plaintiffs in error, under circumstances like those exhibited in the present case, should not be held liable; and the more especially so when the person who claims to be the owner, does not show that he has taken any pains, by advertisement or otherwise, to caution the community that the property in question has been feloniously taken from him; but permits them to receive it from the felon, and to pass it away to other hands, without the slightest intimation that the title does not accompany the possession in that as in all other cases. What reason can there be, that the principle which the courts have with so much justice adopted with reference to stolen bills of exchange and promissory notes, should not be applied to other personal property, equally the subject of mercantile transactions? Why not here as in the cases of those evidences of debt, hold the claimant bound to exercise due diligence in giving the public, notice of his loss; and leave the fact of proper diligence on his side, and of due caution on that of the defendant, for a jury to determine from all the circumstances of the case? Is it because in the case of bills of exchange and promissory notes, the endorsement passes the title? Then equally effective is the possession of goods to evidence the title in all cases, except where the courts have interposed, and held innocent parties liable because they had done that which they believed was legal and right; and had no means of knowing to the contrary but by that information.

It is also urged on the part of the plaintiffs in error, and with strong reason for its support, that although possession may not always be conclusive evidence of property in merchandize, yet when merchandize is abroad in a foreign country, the exigency of commerce requires that possession should be considered as conclusive evidence of property in all cases, where the purchaser acts in good faith, and without notice that the goods do not belong to him who is in the possession of the same. This it would seem should be the rule, as the title of personal property passes by the delivery; and in two thirds or even three fourths of all that is passed through the millions of hands both in this country and in Europe, no other mode of passing the title is used. The public interest demands that such a rule should be adopted, or public notice should be required in all cases of the loss by felony of personal property. Otherwise, I cannot divest my mind of the strong impression which it has received, that a blow will be struck at the commercial interests and prosperity of our

state, the extent of the evil effects of which it will be difficult to conceive. All who are in the least acquainted with the commercial relations of our country know that they are very extensive and important both with England and France and other countries, amounting to many millions of dollars in the course of a year. Suppose for an instance, that a man in either of those European countries should obtain goods by felony—for there are bad men all over the world—and consign them to a mercantile house in New York, one of the most respectable firms in that city, with directions to sell on his account and remit him the proceeds; and they, without any knowledge of the manner in which the goods have been obtained, receive and dispose of the same, and remit the avails as directed; and that some months after comes another person and claims those goods as his property, and in order to be parallel with the case under advisement, without saying a syllable to those merchants in New York, and without ever having given any notice to the world of his loss, he commences an action of trover against them. Would this or any other court hold them liable in that action? or would not a sense of justice and equity revolt at such a proposition? If such an action should be sustained, and a recovery had against such firm under such circumstances, no mercantile commission house could thereafter exist in the city of New York. Baltimore, so far as this question is affected, is a foreign city, and the state of Maryland a foreign state. The several states of the Union, it is true, have confederated for their mutual safety and good government, but in all matters which relate to their internal police, legislative and judicial, they are as much foreign to each other as if situated on either side of the Atlantic; and therefore, in determining this important question, it should be done with a reference to the effect it is to have upon our foreign commercial relations. As I have before remarked, there has been no case, like the present, judicially determined by this court. Saltus v. Everett, 20 Wend. 267, was not the case of property sent to an agent to be disposed of, and the proceeds remitted, but was the case of property converted here by a principal, between which two cases there is, in my judgment, a wide distinction, and involves the same principle as that of Everett v. Coffin, 6 Wend. 605.

Having thus passed through with such an examination as I have deemed it my duty to give this matter, I have to add that the rule, as attempted to be established on the part of the defendant in error, is in my opinion too broad. Although I admit that the government is bound to assist the rightful owner of property in recovering the possession of it when it has been unjustly or feloniously taken from him; yet I insist that this should not be at the expense of an innocent person, without some notice, and especially in the present case, where the defendant in error kept the offender in his employment, in which he was at the time of the felony, although he had no charge of the goods; that, however, only serves to free him from a breach of trust, and is introduced for the purpose of showing it was a felony. The principle applies here with great force, that where one of two innocent parties must suffer, the law will impose the penalty upon him by whose fault the necessity exists. The defendant in error kept the felon in his employment, placed confidence in him, and the strong probability is that but for the facilities which his employment in that store afforded him, the felony would never have been committed. At the civil law, when things were damaged or stolen by any of the servants belonging to a ship or an inn, the master of the ship or inn was held liable to pay double the value of the goods so damaged or stolen to the person sustaining the loss; but when the damage or theft was done by a stranger, or by persons unknown, the master was simply obliged to make good the loss. The reason for this important distinction is very evident. The master had in the first instance placed those servants there, and reposed confidence in them, which was a voluntary act on his part, and he should therefore answer for the wrong he had done the community by employing improper persons, as, in most cases, the exercise of an ordinary degree of caution would have enabled him to have become acquainted with the character and habits of his employees; but in the second instance, the master had not employed the person who committed the injury, or at least the fact that he had done so could not legally be brought home to him, still as the goods had been deposited with him, they should be forthcoming, or he should pay their value, but no damages as in the first instance for the wrong he had done society by keeping about him untrustworthy servants. The application of this principle to the case in hand may be made with much facility and correctness. Although I fully assent to the legal propositions, that no title passes where a felon sells stolen goods even to an innocent purchaser, and that the owner is entitled to take his goods wherever he can find them, yet I can by no means assent to the inference sought to be drawn from those propositions: that an innocent agent who is not a purchaser, who claims no title to the goods in himself, but merely acts as a public auctioneer in disposing of them at a public and open sale, and under a public notice that he will do so,—who has paid over the proceeds of that sale, and delivered the property to the vendees before any notice or knowledge of the felony, and without any facts or circumstances to put him on his guard, and without any previous demand having been made upon him,—is liable in an action for the value thereof to the owner. For these several reasons, I think the judg-

ment of the supreme court should be reversed.

By Senator VERPLANCK. The decision of this court last year, in the case of Saltus v. Everett, 20 Wend. 267, acknowledged and confirmed the principle, that the owner of personal property cannot be divested of his rights, unless by his own act or his own assent; and that it is no defense against such a superior and original title for a subsequent possessor, that he honestly purchased the goods in the course of trade from a person not authorized to sell them, though otherwise in lawful possession. In applying this doctrine to the present case, the following questions arise: The plaintiff below seeks to recover the value of his goods, not from one having them in possession and refusing to deliver them, or from one who sold for his own benefit, or otherwise converted them to his own use, but from auctioneers who received the goods without knowledge that they had been stolen, sold them and transmitted the proceeds to their supposed owner, who was in fact the felonious taker of the property. Are these innocent sellers liable to the true owner for the amount of his loss, or must his remedy be limited to following the goods themselves, and recovering them or their value from the person actually in possession under a defective title?

The principle of the decision in Saltus v. Everett, and of the authorities on which it rests, apply with equal force to the present case. The policy of our law is to make every man look to the character of those with whom he deals, and who are responsible for the title of property in the articles bought and sold. If he does not do this, he must take the consequent risk. The same considerations of public policy apply to him who sells as the agent of another, as to him who buys; both of them are to look to the character of the person with whom they deal. If in this they are negligent, or have been deceived, they must take the consequences whenever their rights come into conflict with those of any innocent sufferer by the act of the same guilty third party. Accordingly the doctrine of our decisions is, that the original and true owner of moveable property, who has not by his own act or assent given a color of title or an apparent right of sale to another, may recover the value of those goods from any one having them in possession and refusing to deliver them up, or who has applied them to his own use, or has in any other way converted them, i. e. has changed the substance of the things in question, their character, use or ownership, to the injury of the real owner. The ground of the action used for the purpose is not the actual possession of the moveables, but some wrongful act relating to them: a tortious refusal to deliver them, a tortious taking, or else their wrongful conversion; which last is presumed upon the refusal to give them up, and which is proved by a sale without authority. According to Lord Coke, in the oldest leading case on this head, which still preserves its authority, Isaac v. Clark, 1 Bulst. 312, "there must be an act done to convert one thing into another," and a converting into money by sale has always been held to be within this definition. The very recent English case, Peer v. Humphrey, 2 Adol. & E. 495, recognizes this same doctrine.

In the argument before us, it was very strongly urged that a rule of law, thus charging mere agents, would work great public injury as well as private injustice; as it would extend to common carriers, ship masters and others, through whose hands goods feloniously or wrongfully obtained might pass. There may be some cases going to that length, but they are not, in my judgment, within the principle or the policy of the rule, nor are they included in the older decisions, as, for instance, in the one just cited from Bulstrode. I cannot think the law charges one who had accidentally a temporary possession of goods without claim of property, and with which he has parted before demand. It requires a wrongful taking or conversion of the thing itself to make the transaction tortious. The auctioneers who have sold the goods now in question have made such an unauthorized conversion, and must be answerable for the value. In this instance the rule falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it.

2. It has been maintained with great ability that the rule thus stated, though admitted to be true as to goods tortiously obtained, does not apply to goods feloniously taken, and that damages for the conversion of such goods can be recovered only after conviction of the felon, and only from the person converting or refusing to deliver the goods after that time. In the present case, the felon was convicted, but the conversion and sale had taken place before the conviction. This ground was probably not taken before the supreme court, as it is not noticed in the opinion delivered in that court. I am not quite clear whether this may not be the existing law of England, and whether an action like the present could at any time be maintained there. By the ancient

common law a person robbed could regain his property only by an appeal of larceny after conviction. The statute, 21 Hen. VIII., gave the party robbed a right to immediate restitution after conviction. Several decisions upon the act gave it a construction in conformity with the old law of appeal. It was strictly held that the civil action was merged in the felony. After conviction of the felon, the stolen goods could be reclaimed even if sold in market overt, and whoever sold them after that date was deemed a tortious converter. But it has been expressly decided that the owner who had prosecuted the thief to conviction, cannot recover the value of his goods from one who bought them from the thief, and sold them again before conviction, even with notice. 2 Term R. 750. In the words of Chief Justice Best, in another case (Simpson v. Woodhert, 2 Car. & P. 41): "The law is this: you must do your duty to the public before you seek a benefit to yourself; and then there is no necessity for a civil action. The decisions, says he, go not only to the case of an action against the felon, but also against persons who derive title under him. If such actions could be maintained, there would be no criminal prosecutions." The authority of these and similar decisions has been much shaken, and certainly much narrowed in their application, by the case of Peer v. Humphrey, 2 Adol. & E. 495, decided in 1835. There the court of king's bench held, that in trover for oxen feloniously sold by a servant, their value might be recovered from the bona fide purchaser who had sold them again before conviction. In this case the authority and reasoning of Lord Kenyon in 2 Term R. 750, were overruled by his successor, the present Chief Justice Denman.

But in my opinion, we are not called upon to reconcile these cases, or to decide between them, for whatever may be the law of England, it is quite clear that these peculiar exceptions to the general principle of the law, obtaining on special grounds of policy, have no application within this state. Not only has the foundation of the doctrine been removed by the abolition of appeals of felony and of the former statutory provision of restitution, but a contrary doctrine has been expressly substituted. The English law established the universal rule that the felony excluded or suspended the civil suit until after conviction. Our Revised Statutes enact thus (part 3, c. 4, tit. 1): "The right of any person injured by felony, shall not in any case be merged in such felony or be in any manner affected thereby." The first part of the section may, perhaps, by a strict construction, be confined to the action against the felon himself, which was formerly held to be merged in the felony; but the concluding words have no force or effect unless they extend to cases like the present. Chief Justice Best, as just cited, says: "The decisions go not only to the case of an action against the felon, but also against persons claiming under him." As the action against the felon is restored by the first part of the section, so that against persons claiming under him must be comprehended under the final words: "the rights of any person injured by any felony, shall not be in any manner affected thereby." The abrogation of the whole policy of the English law on this head, removes the only exception before known to the general right of the real owner to follow his property and recover its value in any hands whatever. But we need not rest merely on the general terms of this enactment. The whole policy of the statute of restitution upon which the English decisions stand, has been altered in our statute. Instead of requiring a conviction before stolen goods are restored, lest (as Hale and Blackstone say) "felonies should be made up and healed," our Revised Statutes direct that "upon receiving satisfactory proof of the title of any owner, the magistrate who shall take the examination of an accused person, may order the same to be delivered to such owner." And again: "If stolen property shall come into the custody of any magistrate, upon satisfactory proof of the title of any owner thereof, it shall be delivered to him." Finally, the English statute is in substance re-enacted, with this remarkable addition: "If the property shall not before have been delivered to the owner." These several provisions, taken in connection with the abolition of appeals of felony and of the merger of the civil remedy in the criminal prosecution, shew, I think, conclusively, that the English doctrine on this head, even in the more limited sense as laid down by Chief Justice Denman, has no application in this state.

If this view of the subject be correct, our own legislation here affords another instance of the gradually but increasing respect for the rights of original ownership against all other claims (even that of an innocent and apparently lawful possessor), which has marked the advance of civilized life. Chancellor Kent (2 Kent, Comm. 320) has drawn a striking and philosophical outline of this advance. He has shewn how, in the earlier ages of the Roman, the German, and the English law, the rights of the first proprietor of things moveable, when divested of his possession, had little preference over that of any other possessor under color of right; and how the respect for the rights of property kept on increasing in efficacy with social improvement and the corresponding advance of the law, from rudeness to refinement.

3. It has also been urged before us that where merchandise is abroad in a foreign state, the necessities of commerce require that possession shall be regarded as conclusive evidence of property in respect to a purchaser who acts in good faith. It has also been argued that the cause of action arising in Maryland, where the goods were sold, the decision of this cause might be governed or modified by the law of that state. The law of England,

as well as that of all those states where the common law forms the ground work of the local jurisprudence, considers all personal actions, whether ex contractu or ex delicto, wherever the cause of action arose, as transitory, and subject to the law of the jurisdiction under which the parties are litigant. It is a principle of the same law, pervading the jurisprudence of almost all civilized countries, that "moveables are governed by the law of the domicil of the owner." Lord Loughborough has stated the rule thus: "It is a clear proposition that personal property has no locality," which paradoxically sounding maxim he explains to mean, that personal property "is subject to the law which governs the person of the owner, both in respect to its disposition and its transmission." 2 H. Bl. 690. Our American decisions of interconfederated law (if I may use the phrase), fully sustain this principle. In cases of foreign contracts, the law of the place of contract is recognized as to the force and effect of the contract itself; because it is presumed to enter into the consideration of the parties, to form a part of the bargain, and to interpret its language and meaning. In other respects, rights as to personal property are seldom governed by the lex rei sitæ, or that of the jurisdiction where it may accidentally be, whilst the owner dwells and the suit is brought elsewhere. Now, this is not a case of contract, but a question of ownership and conversion. The same rule, therefore, must be applied to the sale of these goods in Baltimore as if they had been sold in Albany. There may possibly be cases where the same reasons of justice and policy which give authority in our courts to the foreign lex loci contractus may give similar weight to the lex rei sitæ, so as to make the foreign law of the temporary locality of the moveables, vary that of the owner's domicil. The extent or the limitations of such exceptions to the general law we are not now called upon to decide. We have no evidence that the local law of Maryland differs as to this matter from our own. The naked fact, that the goods were sold in another state, can have no effect to change or vary those rights of personal property which are prescribed by that which, in this case, is alike the law of the owner's domicil, and of the jurisdiction in which he asserts these rights. The judgment of the supreme court should be affirmed.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows:

In the affirmative—Senators FURMAN, HAWKINS, HULL, MAYNARD, WORKS —5.

In the negative—THE CHANCELLOR, and Senators CLARK, EDWARDS, HUNT, HUNTER, JONES, H. A. LIVINGSTON, NICHOLAS, PAIGE, PECK, POWERS, SKINNER, SPRAKER, STERLING, VERPLANCK, WAGER—16.

Whereupon the judgment of the supreme court was affirmed.

J.

GRIFFITH v. FOWLER.

(18 Vt. 390.)

Supreme Court of Vermont. Windsor. July Term. 1846

Trespass for taking a shearing machine. The case was submitted upon a statement of facts, agreed to by the parties, from which it appeared, that in 1836 the defendant, being the owner of the machine in question, lent it to one Freeman, to use in his business as a clothier, who was to pay a yearly rent therefor, and in whose possession it remained until the year 1841, when it was sold at sheriff's sale, on execution, as the property of Freeman, and one Richmond became the purchaser; that Richmond, in January, 1842, sold the machine to the plaintiff, who at the same time purchased of Freeman the building, in which the machine was situated, and took possession thereof; and that the defendant, in February, 1842, took the machine from the plaintiff's possession, claiming it as his property. The value of the machine was admitted to be fifty dollars. Upon these facts the county court,—HEBARD, J., presiding.—rendered judgment for the defendant. Exceptions by plaintiff.

Tracy & Converse, for plaintiff. *J. S. Marcy*, for defendant.

REDFIELD, J. The only question reserved in this case is, whether a title to personal property, acquired by purchase at sheriff's sale, is absolute and indefeasible against all the world, or whether such sale only conveys the title of the debtor.

There has long been an opinion, very general, I think, in this state, not only among the profession, but the people, that a purchaser at sheriff's sale acquires a good title, without reference to that of the debtor, that such a sale, like one in *market overt* in England, conveys an absolute title. But, upon examination, I am satisfied that this opinion acts upon no good basis.

So far as can now be ascertained, this opinion, in this state, rests mainly upon a *dictum* in the case of Heacock v. Walker, 1 Tyl. 338. There are many reasons, why this *dictum* should not be regarded, if the matter were strictly *res integra*. It was a declaration of the chief justice in charging the jury. Cases were then tried by the jury at the bar of this court, as matter of right, and in course, and before the law of the case had been discussed and settled by the court. In all these respects these trials differed essentially from jury trials at the bar of the higher courts in Westminster Hall. Such trials, there, being only matter of favor, granted in the most important cases, and after the law of the cases has been fully discussed, and settled by the court.

The law given to the jury, in the two cases, will of course partake something of the character of the respective form and deliberation of the trials. Under our former practice, law laid down in the course of a jury trial, unless when questions were reserved and further discussed upon motions for new trials, was not much esteemed, even when it was upon the very point in dispute. But especially, the *dicta* of the judge, who tried the case, and who must, of necessity, somewhat amplify the bare text of the law, in order to show the jury the reason upon which it was based, could not be esteemed, as any thing more than the hastily formed opinion of the judge—mere argument, to satisfy some possible, or apprehended, doubt of the jury in regard to the soundness of the main proposition laid down. Such was the *dictum* referred to. That, which was said of Chief Justice Tilghman, of Pennsylvania, is undoubtedly good praise, when said of any judge;—"He made no *dicta*, and he
*393 *regarded none." There are sufficient reasons, why the *dictum* should not be regarded, if the thing were new. And we do not esteem the long standing of the *dictum* of any importance, unless it can be shown, that it has thus grown into a generally received and established law, or usage; which, we think, is not the case in regard to this. For this court has, within the last ten years, repeatedly held, that a sheriff's sale was of no validity to pass any but the title of the debtor, when no actual delivery of the thing sold was made by the sheriff, at the time of sale. Austin v. Tilden et al., 14 Vt. 325. Boynton v. Kelsey, Caledonia County, 1836. S. P., Lamoille County, 1841. Since the first of these cases was decided, the main question, involved in this case, has been considered doubtful in this state, and we now feel at liberty to decide it, as we think the law should be, that is, as it is settled at common law.

But the idea, that some analogy existed between a sheriff's sale and a sale in *market overt* is certainly not peculiar to the late Chief Justice Tyler. This opinion seems at one time to have prevailed in Westminster Hall, to some extent, at least; for in the case of Farrant v. Thompson, 5 B. & A. 826, [7 E. C. L. 449,] which was decided in the King's Bench in 1822, nearly 20 years later than that of Heacock v. Walker, one of the points raised in the trial of the case before Chief Justice Abbott was, that the title of the purchaser, being acquired at sheriff's sale, was good against all the world, the same as that of a purchaser in *market overt*. This point was overruled, and a verdict passed for the plaintiff, but with leave to move to set it aside, and to enter a nonsuit, upon this same ground, with one other. This point was expressly argued by Sir James Scarlet,—who was certainly one of the most eminent counsel, and one of the most discriminating men of modern times,—in the King's Bench, and was decided by the court not to be well taken. Since that time I do not find, that the question has been raised there.

It seems to be considered in Massachusetts, and in New York, and in many of the other states, that nothing, analogous to *markets*

overt in England, exists in this country. Dame v. Baldwin, 8 Mass. 518. Wheelwright v. Depeyster, 1 Johns. 480. 2 Kent 324, and cases there cited. Nothing of that kind, surely, exists in this state, unless it be a sheriff's sale. And if the practice of holding sales in *market overt* conclusive upon the title existed in any of the states,
*it would be readily known. I con- *394
clude, therefore, that Chancellor Kent is well founded in his opinion when he affirms, that the law of *markets overt* does not exist in this country. Ib.

It seems probable to me, that the idea of the conclusiveness of a sheriff's sale upon the title is derived from the effect of sales under condemnations in the exchequer, for violations of the excise or revenue laws, and sales in prize cases, in the Admiralty courts, either provisionally, or after condemnation. But these cases bear but a slight analogy to sheriff's sales in this country, or in England. Those sales are strictly judicial, and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world.

Something very similar to this exists, in practice, in those countries, which are governed by the civil law; which is the fact in one of the American states, and in the provinces of Canada, and in most, if not all, the continental states of Europe. The property, or what is claimed to be the property, of the debtor is seized and libelled for sale, and a general monition served, notifying all having adversary claims to interpose them before the court, by a certain day limited. In this respect the proceedings are similar to proceedings in prize courts, and in all other courts proceeding *in rem*. If no claim is interposed, the property is condemned, by default, and sold; if such claims are made, they are contested, and settled by the judgment of the court, and the rights of property in the thing are thus conclusively settled before the sale.

But with us nothing of this character exists in regard to sheriff's sales. Even the right to summon a jury to inquire into conflicting claims *de bene esse*, as it is called in England, and in the American states, where it exists, has never been resorted to in this state. And in England, where such a proceeding is common,—Impey 153; Dalton 146; Farr et al. v. Newman et al., 4 T. R. 621,—it does not avail the sheriff, even, except to excuse him from exemplary damages. Latkow v. Eamer, 2 H. Bl. 437. Glossop v. Pole, 3 M. & S. 175. It is plain, then, that a sheriff's sale is not a judicial sale. If it were, no action could be brought against the sheriff, for selling upon execution property not belonging to the debtor.

With us an execution is defined to be the putting one in possession of that, which he
has already acquired by judgment of
*395 law. *Co. Lit. 154 *a*. (Thomas' Ed. 405.) But the judgment is of a sum in gross "to be levied of the goods and chattels of the debtor," which the sheriff is to find at his peril. The sale upon the execution is only a transfer, by operation of law, of what the debtor might himself transfer. It is a principle of the law of property, as old as the Institutes of Justinian, *Ut nemo plus juris in alium transferre potest, quam ipse habet*.

The comparison of sheriff's sales to the sale of goods lost, or estrays, in pursuance of statutory provisions, which exist in many of the states, does not, in my opinion, at all hold good. Those sales undoubtedly transfer the title to the thing, as against all claims of antecedent property in any one, if the statutory provisions are strictly complied with; but that is in the nature of a forfeiture, and is strictly a proceeding *in rem*, wherein the finder of the lost goods is constituted the tribunal of condemnation.

There being, then, no ground, upon which we think we shall be justified in giving to a sheriff's sale the effect to convey to the purchaser any greater title, than that of the debtor, the judgment of the court below is affirmed.

GATES v. RIFLE BOOM CO.

(38 N. W. 245, 70 Mich. 309.)

Supreme Court of Michigan. May 18, 1888.

Error to circuit court, Bay county; S. M. Green, Judge.

Samuel G. M. Gates brought an action of trover and conversion of a certain quantity of white pine saw-logs against the Rifle Boom Company. Judgment for defendant. Plaintiff brings error.

Holmes & Collins, for appellant. Hanchett & Stark, for appellee.

MORSE, J. The plaintiff, in his lumbering operations, in 1882 cut over the line upon the adjoining land of Rust Bros. & Co., and thereby secured and marked as his own about 135,000 feet of logs belonging to the latter. These logs were mixed with the other logs of plaintiff, and banked on the west branch of the Rifle river. They were not run out the following spring, but remained in the rollway during the summer and fall of 1883. In that year Rust Bros. & Co. sent some scalers where the plaintiff's logs were, who selected out, as best they could, logs of the same quality as those taken from the Rust lands by plaintiff, and about the same quantity, and marked them with the stamp of Rust Bros. & Co. Such logs then bore two brands, the mark of plaintiff, "C. O. W.," and the Rust mark, "7 R. 7." Under the usual contract by plaintiff with the defendant boom company these logs, intermingled with other logs of the plaintiff, were driven down the stream in the summer of 1884, and received in the defendant's boom. The defendant was notified by Rust Bros. & Co. not to deliver the logs with the double marks upon them to plaintiff. The boom company thereupon delivered the double-marked logs, about 155,000 feet, to Rust Bros. & Co., who, finding that more were marked by their scalers than they were entitled to, returned to plaintiff 20,590 feet of the same. The plaintiff, after demanding these logs of the boom company, and after its refusal to deliver them, brought this suit in trover in the circuit court for the county of Bay. The cause was there tried before a jury, and verdict and judgment passed for the defendant. The plaintiff in this court assigns as error the following instructions given by the court: "If the plaintiff cut the logs innocently, supposing them to be upon his own land, and mixed them with his own so that they could not be identified, and after they became mixed with his own, so that the logs cut from Rust Bros. & Co.'s lands could not be identified, then Rust Bros. & Co. had the right to select from the common mass a quantity of an average quality of their own, equal to the quantity taken from their land." And also, in the same connection, after having stated the rule as to willful trespasses, instructing the jury further as follows: "But a different rule prevails where a party innocently mingles his property with that of another, and where it is undistinguishable, and where the general quality and character of the property is the same, as in the case of the same kind of logs, white pine, if you please, and of the same general quality as near as may be. There, if the logs are confused, neither party loses his own. Both parties have a right to their own, and neither party being able to distinguish his own, the party whose property has been mingled with another's property by the act of that other party may take so much of the common mass as he has in it."

It was claimed by the plaintiff upon the trial, and he so testified, that the logs taken by Rust Bros. & Co. were of greater value in quality than those cut by him from their lands. The quantity cut by him on the Rust lands was not claimed to be less than the quantity taken by Rust Bros. & Co. It therefore became material to ascertain, upon the trial, whether the plaintiff was a willful trespasser, or cut the logs innocently, in good faith, believing that he was within the lines of his own land. The court instructed the jury as to the difference between a willful and an unintentional trespass, stating to them, in substance, that if the trespass was a willful one, if Gates knew he was cutting the logs of Rust Bros. & Co., and so, knowing them not to be his, intermingled them with his own that they could not be distinguished, Rust Bros. & Co. had a right to take more than their own, and if, in order to get all that belonged to them, and without intending to take more than belonged to them, they did take a better quality of logs than they had lost, if they did not make the selection with that view, the plaintiff could not recover for such excess in quality; but if the plaintiff cut the logs, and marked and mingled them with his own, in good faith, believing them to be his own, then, if Rust Bros. & Co. took more than they were entitled to, the plaintiff might recover the excess. The counsel for the plaintiff very ably and forcibly contended in the argument here that if the plaintiff was innocent of any wrong, he was entitled to recover in this action, if Rust Bros. & Co. took no more logs in quality or quantity than were cut upon their lands, the difference between the value of the logs and the value of the standing timber, that Rust Bros. & Co. could claim no more than the value of the stumpage. He argues that if Rust Bros. & Co., under the same circumstances, had sued the plaintiff in trover for the value of the timber so cut, the measure of damages would have been the value of the stumpage, and that they could not have recovered what they obtained in this suit, the value of the logs, representing not only the value of the standing timber, but also the worth of the labor of plaintiff added thereto. Citing Ayres v. Hubbard, 57 Mich. 322, 23 N. W. Rep. 829. The object of

the law being, in both cases, to enable the party, deprived of his property to receive compensation therefor, he asks, "Why should the man who strictly follows the law, and adopts a legal course of procedure" to obtain his property be in a worse position, and receive less than he who uses force or strategy to recover possession of his property? He claims that in this case the plaintiff added innocently to the value of this timber the cost of cutting and putting in the logs, which was the sum of $2.25 per thousand feet, and also the value of the driving and booming charges. He estimates this value at over $300. But in the first place it seems to me that this amount, the value of the plaintiff's labor and expenses upon the logs, could not be recovered in an action of trover. The logs were still the property of Rust Bros. & Co. The trespasser, however innocent, could acquire no property in these logs, nor could he acquire a lien upon them for such labor and expense. The conversion of trees into saw-logs by a trespasser does not change the title to the property, nor destroy the identity of the same. The owner of the land is the owner of the logs, and the trespasser has no title to them. Therefore when he regains his own, he has converted no property of the trespasser to his own use. Stephenson v. Little, 10 Mich. 433; Final v. Backus, 18 Mich. 218–232; Mining Co. v. Hertin, 37 Mich. 337; Arpin v. Burch, 68 Wis. 619, 32 N. W. 681; Winchester v. Craig, 33 Mich. 205; Grant v. Smith, 26 Mich. 201; Tuttle v. White, 46 Mich. 485, 9 N. W. 528. In the case of Mining Co. v. Hertin, 37 Mich. 337, the trespasser sought to recover in a special count in assumpsit for the value of his labor expended in cutting the wood. In this case, if any action would lie for the labor of cutting the logs and the expense of getting them into the stream and down to the boom it would seem that the plaintiff's remedy would be in assumpsit. But in the case above referred to it was held that he could not recover the benefit of his labor at all. There can be no doubt that the rule is well settled in this state that if Rust Bros. & Co. had taken possession of these logs while they were lying upon their lands, they would have been entitled to them as they were, and that no claim could have been made against them by the plaintiff for the labor and expense of cutting them. The identity of the timber would not then have been destroyed, and the subsequent intermingling of these logs with the logs of plaintiff, although innocently done, could not change the rights of the owners. The evidence shows that between the time Rust Bros. & Co. discovered the trespass and the time they took possession of the logs by marking them, no labor or money was expended by the plaintiff upon them. Therefore it follows that as this case stood the plaintiff had no claim upon Rust Bros. & Co. that he could enforce in this action, unless they took possession of a better quality of logs than he cut upon their premises and the same amount or more in quantity, and his trespass and intermingling of the property was innocently done. And the court was right in his interpretation of the law as to innocent trespassers. The seeming injustice pointed out in the argument of the plaintiff's counsel is not an injustice, but the result of the election of the owner to take less than he is by the law entitled to. The owner of standing timber is not only entitled to the timber, but he has a right to it as it is, and to keep it uncut if he so desires. No man, however innocently he may do it, can go upon his land and convert the standing trees into logs and charge him for the labor thus expended against his will, and perhaps against his real benefit. He may prefer to have the timber to stand, and if left standing a few years may bring him immense profit. Such instances have not been rare in the history of pine timber in this state. The supposed enhancement of his property by the labor of the trespasser may thus turn out to be a positive injury. There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs. Such trespasses, though casual and not willful, are ordinarily, as was the trespass in this case, the result of negligence upon the part of the trespasser, and there is no good reason why he should be recompensed for labor and expenses incurred in the trespass when it might have been avoided by proper diligence. The owner has the right to reclaim his logs, but if he sees fit to bring an action of trespass or trover instead of regaining his property he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it. The trespasser cannot complain of this, neither can he complain if he elects to take his property if he can find it. As was well said in Mining Co. v. Hertin, supra: "Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error."

The further and only question in the case is the alleged error of the circuit judge in rejecting the offer of the plaintiff to prove by Harvey Parker that while said Parker was foreman for the plaintiff, and was at work on the 80-acre tract adjoining the 40-acre tract claimed by Rust Bros. & Co., and before all of the logs had been hauled from the strip of real estate in dispute in this case, said McTavish and Gates then being at the camp. McTavish, while there, made no complaint or objection as to where they were cutting; made no claim that plaintiff and his men had committed a trespass; and in answer to a question by said Parker, after Gates had gone away, McTavish said the line plaintiff's men had cut

to was all right. And in sustaining the defendant's objection to the following question to the said Harvey Parker: "Did you have any talk with McTavish about the line to which you had cut?" the counsel for the plaintiff claims that this evidence was material and competent as bearing upon the good faith of the plaintiff in cutting the timber; that it does not appear from the verdict of the jury whether they found such trespass willful or not. It was conceded that Rust Bros. & Co. took about the quantity of logs they were entitled to, but if they took a much better quality, as plaintiff claimed they did, and the trespass was found by the jury to have been an innocent one, the plaintiff's counsel claims that there should have been and probably would have been a verdict in his favor for the value of the excess in quality so taken. In determining the competency and materiality of the proposed proof it will be necessary to enter somewhat into the facts of the trespass. McTavish was a land-looker, and a woodsman and general foreman, looking after the different lumber camps of Rust Bros. & Co., and looking after trespasses committed upon their lands, but not having any authority to locate or agree upon the boundaries of such lands. The plaintiff called upon McTavish, before he did any cutting, and asked him if he would go with him and see if they could not locate the line between his land and that of Rust Bros. & Co. He does not state that he supposed McTavish had any authority to locate the line. He says: "I had known him a good many years, and knew him as a man in the employ of the Rusts." "Question. You knew he was their agent and their woodsman? Answer. I believed him to be a good land-looker. I asked him if he would go with me and see if we could locate the line between 28 and 29 north, of the quarter post. He said he knew where the south section corner of the section was. We will go there and see if we can find it." They went up into the woods, and undertook to run out the line. They disagree somewhat in their testimony. As they were pacing on the supposed line the plaintiff did some blazing. McTavish testified that he forbade this blazing, saying to Gates that there was no telling whether they were right or not, as they were running the line out with a pocket compass. He says: "I told Mr. Gates at the time that there was timber enough along the line, whoever lumbered there first, to have that line established by a surveyor, and he made the remark then that that line would be just a guide for him when he went in there again to know about where he was;" and they agreed that it should be surveyed before it was lumbered. Gates testified that he blazed the line they ran out. That at one point McTavish said: "I don't know, we may not be just right here, and perhaps you hadn't better blaze." I says: "It will be a guide to us to know where we have come, and I will continue the blazing until you get to the corner." That McTavish said that he was satisfied that was the right line, and said further: "That line is as correct a line as we can get through here; but as timber is thick on the line down below between you and Rust you ought to have a surveyor run a compass course from this corner to this quarter post to be sure, as I have dodged a little in traveling north. We have come as straight as we could." To this, Gates says, he assented. No line, however, was run by a surveyor until after the cutting. Harvey Parker was the foreman of the plaintiff. McTavish was asked, on cross-examination, if he did not have a conversation with Parker about this line, and answered that he did not remember it, but said that he stayed one night at his camps and presumed he told Parker that the plaintiff had cut to the line that he and Gates ran. Denied ever stating to him that the cutting was all right, or that they had the right line. This conversation, if any was had, was after the cutting of the logs. The offered evidence of Parker was rejected at first by the court upon the ground that it was not competent because it took place after the cutting. Parker afterwards testified that at the time of the talk the timber was all cut off of this strip belonging to the Rusts, and that some of the logs had been taken off; that Gates was not present when the conversation took place; and there was no evidence offered to show that Gates ever knew of the talk. Thereupon the court ruled that it was not material. We think the court did not err in the ruling. McTavish had no authority to bind the Rusts, and what he might have said after the trespass was committed could have no bearing upon the question of the good faith of the plaintiff, especially when there was no evidence that Gates was informed of what McTavish said. Nor was it admissible as impeaching testimony not being material to the issue.

The judgment of the court below must therefore be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

WOOD et al v. PACKER.

(17 Fed. 650.)

Circuit Court, D. New Jersey. July 14, 1883.

In equity.

F. C. Lowthorp, Jr., for complainant. James Buchanan, for defendant.

NIXON, J. This action is brought against the defendant for infringing certain reissued letters patent, No. 9,368, dated August 31, 1880. The Delaware Coal & Ice Company was the owner of the original patent, No. 73,684, and brought suit in this court against the same defendant for their infringement. It was found, upon examination, that although the patentee in his specifications stated the nature of his invention to consist in the funnel-shaped mouth attached to the cart, in combination with the chute and valve, he had failed to make any claim for such combination; and as none of the separate constituents, as set forth in the three claims, were new, the court was obliged to hold that the defendant was not shown to have infringed anything claimed in the complainant's patent. Since then the original patent has been surrendered, and a reissue obtained, with quite a different statement of the inventor's claims. They are as follows: (1) The combination of the body of a coal cart with a sliding extension chute, substantially as and for the purpose set forth; (2) the combination of the body of a coal cart and the outlet, having a gate or valve, with a sliding extension chute, adapted to the said outlet, substantially as specified.

The answer sets up three defenses: (1) That the reissue is void because the combination claimed is an expansion of the original; (2) want of novelty in the patent; (3) non-infringement.

The second is the only one of these defenses which seems to have merit, or which has been the occasion of any serious or extended inquiry. Do the specifications and claims of the patent as reissued indicate invention on the part of the patentee? The patent is for a combination, the constituents of which are stated in the claims above quoted. There is no difference, in fact, between the claims, except that the second has one element which is not named in the first, to-wit, the outlet, having a gate or valve, and which is the means of communication between the first and third constituents of the combination. Its absence gives much force to the argument of the learned counsel of the defendant, that the first claim is void because the parts are old, and there is no dependence or co-operation in their action whereby any new result is obtained. A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination, the elemental parts must be so united that they will dependently co-operate and produce some new and useful result. A coal cart is not novel, nor is the chute for conducting coal from the cart to the place of its destination. These two instrumentalities are aggregated in the first claim; but no mechanism is suggested whereby the coal can be got out of the cart and into the chute. The complainant (Wood) testifies as a witness that it can be accomplished by the use of a man with a shovel. This is probably true; but it is difficult to see how the inventive faculty is put in exercise by any such arrangements. It is not necessary, however, to dwell upon this view of the case, because the entire reissue will not be avoided on account of the existence of one void claim. See Carlton v. Bokee, 17 Wall. 463.

The constituents of the second claim of the reissue are (1) the cart or wagon; (2) the outlet, with a gate or valve; and (3) the sliding extension chute. The patentee was asked whether he thought any of these elements, separated from the others, was novel, (Com. Rec. 28, 29,) and replied, "I do not think they are, but only in combination."

The case is then presented here which was considered by the supreme court in Hailes v. Van Wormer, 20 Wall. 368, and in which Mr. Justice Strong, speaking for the whole court, said: "All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. * * * Merely bringing old devices into juxtaposition and then allowing each to work out its own effect, without the production of something novel, is not invention."

The question, then, is in regard to the second claim of the complainant's reissue: Is it a patentable combination, producing new and useful results, or is it a mere aggregation of old elements, each working out alone its single individual effect?

It is not a question of easy solution, for it requires us to find the exceedingly delicate line which divides patentability from simple mechanical skill, or to ascertain the difference between real invention and a double use or application of something that has existed before. Mr. Curtis, in section 41 of his treatise on the Law of Patents, in discussing this subject, says: "The subject-matter of a supposed invention is new, in the sense of the patent law, when it is substantially different from what has gone before it; and this substantial difference, in cases where other analogous or similar things have been previously known or used, is one measure of the sufficiency of invention to support a patent. Our courts have, in truth, without always using

the same terms, applied the same tests of the sufficiency of invention which the English authorities exhibit in determining whether alleged inventions of various kinds possess the necessary element of novelty; that is to say, in determining this question, the character of the result, and not the apparent amount of skill, ingenuity, or thought exercised, has been examined; and if the result has been substantially different from what had been effected before, the invention has been pronounced entitled to a patent."

If all improvements upon existing organisms were patentable, there would be no doubt about sustaining at once the complainant's patent. But sometimes better results are produced by mere mechanical skill, without the exercise of invention. The law does not extend to or cover such cases (Smith v. Nichols, 21 Wall. 118), nor where the change is only in degree, and not new. Guidet v. Brooklin, 105 U. S. 552; McMurray v. Miller, 16 Fed. 471.

The complainant's patent is undoubtedly a great improvement upon everything that went before it. The invention of William Bell (letters patent No. 14,301, granted February 26, 1856) was set up by the defendant as an anticipation, and it certainly contains valuable suggestions. His dumping wagon, however, could not be used for delivering coal in cellar windows, but only for dumping it into pavement vault-holes, where they happened to exist in front of houses, at a proper distance from the edge of the pavement, and it seems to lack adjustability for doing even this successfully.

The evidence shows that Richard Hammell, a respectable citizen of Chambersburg, was formerly engaged in the coal business in Lambertville, New Jersey, and that as early as 1863 he was in the habit of using chutes in delivering coal from a wagon into a cellar. He thinks that he introduced the double or sliding chutes in the fall of 1865, and continued to use them for 10 years. The narrow end of one passed into the wider end of the other. He used the double chutes when the distance for delivery was too far for the single. When the distance was greater than the single chute, they pushed them one into the other to adjust the length. When the distance was still greater, they had chutes that would reach any house. The longest single chute was 16 feet; by combining them they could reach 24 feet, or more, if necessary. When more than one was used, they carried a light trestle to support them in the middle. * * * They had half a dozen such chutes, and when they had occasion put them together.

Peter C. Hoff was also in the coal business in Lambertville, in the spring of 1867, and has continued therein ever since. He used chutes of different lengths, made tapering, and growing smaller to the end, which went into the cellar. The lower end would rest on the cellar window, or the place made to put in the coal. He used more than one at a time, but not frequently. He generally had three chutes,—one about 7 feet long, one about 12, and the other about 14 feet. Then if the place to put the coal in was 10 feet from the line of the street, he would use two chutes, would shove the small end of the one into the larger end of the other, with a trestle under where the connection was, and also a prop by the wagon,—being a seat, board, or something similar,—in order to hold it up to let the coal run into the cellar. He used the 14-feet chute and the 7-feet together in that way, which was about the longest distance he ever used the chute. But in all these cases the coal was shoveled from the wagon into the chutes, which were not attached to the wagon in any way. This testimony exhibits the state of the art when the complainant appeared with his improvement. He has not very largely exercised the inventive faculty in what he has done. His combination is so simple that it seems wonderful that other persons did not think of it. But they did not, and if it has effected any new and useful result the law protects him in its exclusive use. The evidence reveals that by his combination of old instrumentalities a load of coal can be emptied from a cart into a cellar without the agency of a man using a shovel. This is a new result, worthy of the notice of the law, and it is the duty of the court to give to the patentee the benefit of his invention.

A decree must be entered for the complainant, and a reference made for an account.

DRUMMOND et al. v. VENABLE et al.

(26 Fed. 243.)

Circuit Court, N. D. Illinois. Nov. 9, 1885.

In equity.

Coburn & Thacher, for complainants. Offield & Towle, for defendants.

BLODGETT, J. This is a suit for infringement of patent No. 200,133, issued February 12, 1878, to James T. Drummond, for "an improvement in marking plug tobacco." The patentee in his specifications says: "The object of my invention is to mark plug tobacco in such a manner that the retail dealer can cut the lump into smaller plugs, or pieces of equal and definite sizes, and at the same time the wrapper will be secured to the filling by means of the marks or indentations. My invention consists in making the plug of tobacco with a series of indented lines upon its face or faces, which are arranged so as to space off the surface of the plug into subdivisions of uniform and definite size and weight, whereby they become guides in cutting up the plug for retail sales, and which also serve to more firmly secure the wrapper to the filling, so as to prevent the starting of the former from the latter. It is customary in the manufacture of tobacco to make plugs that weigh one pound. Plug tobacco is mostly retailed in pieces of one or two ounces in weight. It is more expensive to make up small plugs of these sizes, and consequently it is desirable to manufacture tobacco in large lumps, and let the retailer cut them up as he sells them. But the seller experiences great inconvenience in cutting the plugs into pieces of just the desired quantity; hence guides are desirable to enable the dealer to cut from a large plug exactly an ounce, or two ounces, or any definite quantity, consisting of the unit of sale, or some multiple thereof. * * * Should any other unit of sale be adopted, or should the plug be of different size, the size of the subdivisions should be varied correspondingly; but the marks are always placed so as to serve as accurate guides in cutting up the large lump. The lines may also be made in each face of the plug, and in fact this is desirable in securing the additional function of the indentations hereinafter specified."

The claim of the patent is: "As a new article of manufacture, a plug of tobacco, one or both faces of which are marked off by indented lines, which serve to secure the wrapper to the filling, and also as guides for cutting up the plug into small pieces of definite size and weight, substantially as and for the purpose set forth."

The defendant makes tobacco plugs of the same size and general appearance as the complainants, with creases stamped or impressed upon the face of the plug at uniform distances from each other, so that these creases serve as guides in cutting up the plug in measured parts for retailing. The defenses are (1) the want of novelty; and (2) that the defendants do not infringe.

Much of the testimony put into the record bears upon the question whether the complainant was or was not the first to invent and manufacture tobacco plugs marked with indentations to serve as guides for cutting the plug into measured quantities. This testimony is conflicting and contradictory, and, did I feel compelled to dispose of the case upon it, would require careful anaylsis and criticism; but I am satisfied from the proof that there is nothing new in this device. The proof shows that cakes had been made by bakers for many years before the alleged date of this invention, marked off with indented lines to show how to cut the same in measured quantities or pieces for retail. The same practice had been adopted in the manufacture of chocolate, for the purpose of dividing it into measured pieces for retail; and also in the manufacture of candies. I take it, very few men who are as old as I am, and whose early experience was in the eastern states, will fail to remember the gingerbread peddler, with his cards of gingerbread lined off in spaces where he was in the habit of breaking or cutting it off for the purpose of retailing it to the boys around his stand; and with this fact in remembrance it seems to me it could hardly be invention to simply mark a plug of tobacco so it could be cut off in equal and measured quantities.

The record also shows a patent issued to James Spratt, February 24, 1874, for an "improvement in pressing teas for use," which consisted in pressing the tea leaves into a solid cake with indentations, so that the quantity needed for use at one time could be readily broken off. After this device had been applied to different kinds of goods so as to indicate measured quantities, there could hardly be any invention in applying it to tobacco. But it is claimed there is an element of utility in these indentations, as applied to tobacco plugs, because it is said they serve to fasten the wrapper more firmly to the plug. The proof shows this claim of utility is, at least, doubtful; but even if fully supported by the proof, it is manifestly incidental, and is not the main purpose of the indentation.

I therefore feel compelled to hold this patent void, for want of novelty, and shall dismiss the bill for want of equity.

PHILLIPS et al. v. RISSER et al.

(26 Fed. 308.)

District Court, N. D. Illinois. June 29, 1885.

In equity.

Burnett & Burnett, for complainants. Peirce & Fisher, for defendants.

BLODGETT, J. By this bill complainants charge defendants with the infringement of reissued letters patent No. 4,212, issued to complainant, December 20, 1870, for "an improvement in wagon and car unloading apparatus," the original patent, No. 83,405, having been issued to Noah Swickard, October 13, 1868. The leading feature in the device is the arrangement of two tilting bars with a platform in such manner that the wheels of the wagon or car to be unloaded can be brought to rest on these bars, when, by tilting the bars, the body of the vehicle is tipped to such an angle as to cause the contents to slide or be dumped out by its own gravity. The defenses interposed are: (1) That the patent is void for want of novelty; (2) that the defendants do not infringe; (3) that the reissued patent is for a different invention from that described in the original, and is such an enlargement of the specifications and claims of the original patent as to make the reissue void.

The proof shows a number of devices, prior to that covered by this patent, for unloading cars or trucks by tilting the platform on which they stand so as to cause the contents of the car to slide out or be dumped into a bin or chute; but from the proof I conclude that Swickard was the first to produce a device by which the wagon was tipped or thrown into an inclined position, by means of vibrating bars or rails, which operated in connection with a fixed or stationary platform; and this arrangement seems to be particularly adapted to dumps for unloading bulk grain from wagons drawn by teams, as the team can pass readily upon the fixed platform, the wheels being so guided as to be brought to rest upon the rails or bars forming part of the vibrating platform.

Most, if not all, the prior devices seem to have been specially adapted to unloading the contents of cars or trucks run upon railroad tracks or tram-ways; but it is noticeable that Swickard specially states that his invention is to be used for unloading wagons or cars, although he only shows it in use as arranged for unloading wagons. But it is suggested that if it is applicable to the unloading of cars it must be radically changed: that, while an ordinary farm wagon stands upon wheels at such height that a sufficient inclination can be obtained by dropping the hind end down until the rear axle strikes the fixed platform, the much smaller wheels of a car would cause the axle to strike the fixed platform before the requisite inclination was secured. It is, however, undoubtedly true that the mere suggestion of this patentee that his machine can be used "for unloading wagons or cars" would not invalidate it as a wagon unloader, even if it should require inventive genius to adapt it to the unloading of cars; that is, it may not be used to unload cars, as the word "car" is commonly used, in contradistinction to "wagon," yet it may cover a valid device for unloading a wagon, and would be valid if it is applicable to one use, even if it is not applicable to all the uses suggested by the inventor. The proof, therefore, shows that there is some advantage in using these tilting rails instead of a tilting platform. I am of the opinion that defense of want of novelty is not made out, although I feel compelled to say that in my estimation there is much reason for doubting whether it requires anything more than mere mechanical skill to adapt the older devices to the unloading of wagons. The patent, at least, must be construed to stand upon a very narrow basis.

As before stated, the original patent showed two platforms; that is, a fixed platform, A, and a vibrating or tilting platform, working in slots in the fixed platform, the pivoted balance bars being tied together at their forward end by a cross-board, which rested upon the fixed platform when the movable one was level with the fixed one, so that the vibrating or tilting bars could not move or act independently of each other, but must raise or lower at the same time. The cross-board or plank, C, also acted as a stop to keep the forward ends of the tilting rails from dropping below the fixed platform, while, by the arrangement of the keys, E, E, they held the rear ends of the tilting platform in place until the wagon was drawn onto them, when, by means of a lever, these supporting keys were withdrawn, and by a slight effort, or the weight of the operator, the rear end of the movable platform was dropped to an angle required to slide the load from the wagon. Each of these tilting rails also contains a self-acting dog, G, which was intended to act as a check to prevent the wagon from running back after it had been drawn upon the platform; and, in order to guide the wagon onto the tilting platform, the lid of the hopper was made long enough to reach from inside to inside of the rail, and raised a couple of inches above the platform, so that it would serve to guide the wheels onto the tilting rails. There was also fixed to the forward ends of these tilting bars a bar or hook, which was intended to prevent the front end of the movable platform from rising higher than should be required to secure the necessary slope of the wagon for causing the load to slide out.

The claims of the original patent were: "(1) The slotted platform, A, in combination with the pivoted balance bars, B, B, board,

C, end-bars, I, I, and stops, H, H, all constructed and operating substantially as and for the purposes herein set forth. (2) The pivoted balance bars, B, B, provided with one or more self-acting dogs, G, in combination with the spring toggle keys, E, E, and key, F, all constructed and operating as and for the purposes herein set forth. (3) The arrangement of the slotted platform, A, balance bars, B, B, and lid, D, to the hopper, substantially for the purposes set forth."

It will be seen that the first claim is for the combination of these two platforms, the one fixed and the other capable of the tilting motion described, with the cross-board which tied the forward ends of the tilting rails together, and the hooks or end-bars which limited the height to which the forward end of the tilting platform could rise. The second claim is for the tilting bars, provided with one or more self-acting dogs, in combination with the keys, by which the rear of the tilting platform was held in place while the wagon was being drawn onto it; while the third claim is for the two platforms and lid of the hopper arranged so as to act as a wheel-guide.

The patent as reissued contains seven claims, and the infringement in this case is charged as to the first, fifth, sixth, and seventh claims. These claims, as to which infringement is charged, are as follows: "(1) The tilting platform, B, in combination with platform or floor, A, as and for the purposes set forth. * * * (5) The combination of platforms, A and B, with a stop device, I, for the purpose set forth. (6) The combination of platforms, A and B, with a receiving bin or chute, C, operated substantially as described, for the purpose set forth. (7) The combination of platforms, A and B, with lid, D, for the purposes set forth."

It is conceded that the defendants have constructed grain dumps with tilting rails, each pivoted and working independently of the other, substantially like the defendants' Model A, in evidence in this case, with some variation as to the mode of locking or stopping the rear end of the rails in place, and one dump, like the defendants' Model B, in which, as will be seen, the forward ends of the tilting rails are tied together by a cross plank; and the first question I propose to consider as to this branch of the case is whether these dumps constructed by the defendants infringe either of these claims of the reissued patent.

The first claim of the reissue is for the tilting platform, B, in combination with the fixed platform or floor, A. In the specifications of the reissue it is said the tilting platform is so constructed "as that its forward end shall rest upon the stationary platform." It must be obvious to any one who studies the operation of these devices that some way must be provided for holding the forward end of the movable platform so that it will not fall below the fixed platform. The specifications of the reissue give no instructions as to how the forward end of the tilting platform is to be constructed, so that it shall rest on the stationary platform; but the drawings show a cross-board which ties the forward ends of the two pivoted bars together, and this cross-board, when these forward ends drop to the level of the fixed platform, must rest on the fixed platform, and thus hold the movable platform level with the fixed platform. This mode of construction is clearly shown in Fig. 2 of the reissue drawing. It may, as I think, be correctly said that this mode of construction shown in the drawings is only one mode, and does not limit the patentee to that mode of construction only; that is, he may, by the reissued patent, use any mode of construction by which the forward end of the movable platform is made to rest on the fixed platform. The rails of defendants' dumps constructed according to Exhibit A rest upon a cross-timber fastened under the stationary platform; while the dump constructed according to Exhibit B shows the forward ends of the rails tied together, so that the cross-board rests on the stationary platform. It seems to me, therefore, that the dumps of the defendant infringe this first claim; that is, they use the fixed and tilting platform acting together substantially as in the reissue, because these two pivoted rails working in their respective slots, when resting upon their front and rear bearings, form a platform, and when a wagon is driven upon them it stands practically upon a platform composed of these two rails and the bearing upon which they rest. When the keys or locks of the rear ends of these rails are removed, then the platform can be tilted, and thereby the wagon put at such an angle as to discharge its load. The tie-bar shown in the defendants' dump, B, and in the drawing, is really inoperative and performs no function, if some other rest for the forward ends of the bar is provided, because these bars working in their slot are all that are needed to hold the four wheels of the wagon, and are practically a platform of themselves, without regard to a tie-board or cross-board connecting their forward end.

The fifth claim is for the combination of the platforms, A and B, with the stop device or hook, by which the platform is prevented from tilting further than is necessary to unload the wagon. The defendants do not use this stop device, and therefore do not infringe this combination.

The sixth claim is for the combination of the platforms, A and B, with the receiving bin or chute. As I shall have something to say about this claim in considering the validity of this reissue, I will only say, in passing, that no special form of receiving bin or chute is shown or described in the specifications. The very idea of dumping or unloading the contents of a wagon or car presupposes that the contents are to be dumped

into some receptacle; and it may well be doubted whether this claim is not too vague and uncertain to be upheld.

The seventh claim is for the combination of the platforms A and B, with the hopper lid, D. This lid, D, as has been said, is arranged to act as a guide to run the wagon wheels upon the rails, and, as defendants use no such device, but have dropped their vibrating rails a slight distance below the surface of the fixed platform, so as to make sure of running the wheels upon the vibrating rails, they do not infringe this combination, their wheel guide being different from that provided in the patent. I therefore conclude that the defendants' dumps infringe the first claim of this reissued patent.

I now come to consider the validity of this reissue. It will be noticed that this reissue was applied for and made more than two years after the issue of the original patent, and the defendants insist that this case is by that fact brought within the cases of James v. Campbell[1] and Miller v. Bridgeport Brass Co.[2] Complainants insist, however that the claims of the reissue are but a restatement of the claims of the original patent. A comparison of the original with the reissued patent shows that the specifications have been much amplified, and, to some extent, new elements are introduced into them. For instance, in the original patent it is said: "A plank or board, C, is secured to the front end of such bars, so that they cannot work independently or separate from each other, but must raise and lower at the same time." In the reissue it is said: "A tilting platform, B, so constructed as that its forward end shall rest upon the stationary platform, while the rear end, consisting of beams or bars, B, shall play within the openings or slots formed in the floor, so that, when required, the rear end of the platform may descend below the line of the floor." Here we have, as it seems to me, a radical departure from the mode of construction indicated by the original patent. The original patent required imperatively that the forward ends of these tilting bars should be fastened together so that they could not work independently or separate from each other, but must raise or lower at the same time. By omitting this element from the reissue, the patentees have caused their device to cover a device which would not be covered by their original patent. Neither the claims of the original patent, nor the specifications, seem to anticipate any other form of construction than one in which the vibrating bars should be fastened together at their forward ends, so that they could not operate independently or separate from each other. By the reissue all that seems to be required is that some rest or stop shall be provided to prevent the forward ends of the vibrating rails from falling below the level of the fixed platform, and, as I have already said, the defendants so construct their dump that the forward ends of the vibrating rails rest upon a timber fastened to the under side of the fixed platform. Here is a new invention or different invention described and claimed from that described and claimed in the original patent. The original patent claimed a vibrating platform of a peculiar construction, with certain elements in it. The reissue claims a different vibrating platform, with less elements in it, and describes a vibrating platform not covered by the original specifications or claims.

As, in considering the question of infringement, I have held that the defendants only infringe the first claim of the reissue, it may not be necessary to consider the validity of the fifth, sixth, and seventh claims of this reissue; but I can hardly forbear the passing remark that the sixth claim of the reissue, which is for the combination of the two platforms with the receiving bin or chute, seems to me to be a most unwarrantable enlargement and expansion of the original patent. The original patent contained no suggestion or description of a receiving bin or chute. The only possible allusion to it is the mention of the lid to the hopper; and yet, by the sixth claim of this reissue, an element which is not in the original patent, either by description or claim, is made one of the elements of a combination. It therefore seems to me that this reissued patent must be held void, as being for an invention not described in or covered by the original patent. This patentee could not, by this reissue, add new features or omit old features, especially after the lapse of so much time from the issue of the original patent.

The proof in the case shows quite conclusively that, at or about the time of the issue of this original patent, this kind of dumps or devices for unloading wagons came into use, especially at elevators and corn-shelling warehouses at railroad stations, and it was found by practical experience that two pivoted rails so arranged that the wagon could be driven upon them, with proper stops to hold them in place, and a device for the releasing of the stop when ready to dump, was all that was necessary for the purpose, and Sypes, McGrath, and other inventors entered the field with this simpler form of dump, whereupon plaintiff sought and obtained this reissue in order to cover this less complicated construction which others had introduced and proved useful.

This bill is dismissed for want of equity.

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[1] Fed. Cas. No. 2,361.

[2] Fed. Cas. No. 9,563.

BARTLETTE v. CRITTENDEN et al.

(Fed. Cas. No. 1,082, 4 McLean, 300.)

Circuit Court, D. Ohio. July Term, 1847.

[In equity. Bill by R. M. Bartlette to restrain A. F. Crittenden and others from infringement of copyright. Injunction granted.]

Mr. Walker, for complainant. Storer & Gwynn, for defendants.

OPINION OF THE COURT. This is an application to enjoin the defendants from printing, publishing, or selling a work denominated "An inductive and practical system of double-entry book-keeping, on an entirely new plan," on the ground that a material part of the manuscript, and the arrangement, were the work of the complainant, and were pirated from him by the defendants. It appears that the complainant for twelve years has been engaged in teaching the art of book-keeping, in the city of Cincinnati and other places. That he had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils; and that he permitted his students to copy these cards, with the view to their own advantage and to enable them to instruct others. That Jonathan Jones, being qualified in the school of the complainant, as a teacher, and having copied the manuscripts of the complainant, engaged, in connection with him, to teach a commercial school in St. Louis. While thus engaged, A. F. Crittenden, one of the defendants, entered the school at St. Louis as a student, and was permitted to copy the manuscripts of the complainant, in the possession of Jones; and from those manuscripts, with certain alterations, he made up the first ninety-two pages of the book, under the above title, which was published in Philadelphia, in connection with his brother, by E. C. & J. Biddle, two of the defendants, in the present year. The answers of the defendants either deny the allegations of the bill, or do not admit them, and call for proof of the facts stated. On this motion for an injunction the merits of the case have been discussed, with much research and ability.

This application is made under the 9th section of the act of congress of the 3d of February, 1831, [4 Stat. 438,] which provides, that "any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, etc., shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury," etc. And power is given to grant an injunction to restrain the publication. The first section of the act of the 30th of June, 1834, [4 Stat. p. 728, c. 157,] requires all deeds or instruments in writing for the transfer or assignment of copy-rights, to be acknowledged and recorded. At common law, independently of the statute, I have no doubt, the author of a manuscript might obtain redress against one who had surreptitiously got possession of it. And on general equitable principles, I see no objection to relief being also given, under like circumstances, by a court of chancery. But this is a proceeding under the statute.

The defendants contend that the complainant, by suffering copies of his manuscripts to be taken, abandoned them to the public. The principle is the same, it is alleged, in regard to copy-rights and patents. And that a consent or permission of the author to use the manuscripts, is as fatal to his exclusive right, as the consent of the inventor to use the thing invented. Rundell v. Murray, [Saunders v. Smith,] 3 Mylne & C. 711, 728, 730, 735; Millar v. Taylor, 4 Burrows, 186, [2303;] Barfield v. Nicholson, 2 Sim. & S. 1. To show the analogy between copy-right and patents, the defendants cited Whittemore v. Cutter, [Case No. 17,601;] Mellus v. Silsbee, [Id. 9,404,] in which the question considered was, did the inventor suffer the thing patented to go into public use without objection? Wolcot v. Walker, 7 Ves. 1; Platt v. Button, 19 Ves. 448; Wyeth v. Stone, 1 Story, 273, Fed. Cas. No. 18,107.

The 7th section of the act of the 3d of March, 1839, [5 Stat. 354,] declares that a purchaser from the inventor of the thing invented, before a patent is obtained, shall continue to enjoy the same right after the obtainment of the patent as before it; and that such sale shall not invalidate the patent, unless there has been an abandonment, or the purchase has been made more than two years before the application for the patent. Before this act, a sale of the right would have been an abandonment to the public by the inventor. The decisions, therefore, referred to, do not apply to cases arising under this statute. A sale of the right is not an abandonment, if made within two years before the application for a patent, as the law now stands; and it may be a matter of some difficulty, within the above limitation of two years, to determine what act shall amount to an abandonment. Where the act is accompanied by a declaration, to that effect, there can be no doubt; but if a sale be not an abandonment, a mere acquiescence in the use of the invention would seem not to be. Within the two years, to constitute an abandonment, the intention to do so must be expressed or necessarily implied from the facts and circumstances of the case. It is a question of intention, as to the extent of the license, of which we must judge, as we are called to do in other cases. But the limitation of two years does not apply in this case, should a copy-right be considered in principle identical with an invention of a machine, as more than two years have elapsed since copies of the complainant's manuscripts were taken with his consent.

The question arises upon the facts stated, and must be decided on general principles. In the first place, there was no consent of

the complainant, that his manuscripts should be printed. That they were not prepared for the press is admitted. They were without index or preface, although, as alleged, they may have contained the substantial parts of the complainant's system, which, in due time, he intended to print. Copies of the manuscripts were taken for the benefit of his pupils, and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the complainant's consent. It is contended that this is an abandonment to the public, and is as much a publication as printing the manuscripts. That printing is only one mode of publication, which may be done as well by multiplying manuscript copies. This is not denied, but the inquiry is, does such a publication constitute an abandonment? The complainant is no doubt bound by this consent, and no court can afford him any aid in modifying or withdrawing it. The students of Bartlette, who made these copies, have a right to them and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves, when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves. In England, if an invention be pirated and given to the public, it prevents an inventor from obtaining a patent. But this is not the construction of our laws. If an inventor of a machine sell it or acquiesce in its public use, not within the limitation of the two years, he forfeits his rights. He must be diligent in making known and asserting his right, where it has surreptitiously got into the possession of another, or he abandons it. This was the settled rule before the act of 1839, and it would seem that cases which do not come within the provisions of that act, must be governed by the old rule. No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscripts of an author. If he permit copies to be taken for the gratification of his friends, he does not authorize those friends to print them for general use. This is the author's right, from which arises the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine, he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not and can not be of general use. Popular lectures may be taken down verbatim, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress. He can not claim a vested right in the ideas he communicates, but the words and sentences in which they are clothed belong to him.

It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copy-right. That an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be given, as no damage would be done. That the parts of a machine, in the process of construction, if pirated, would give no right to an injunction by the inventor. If the manuscript or machine referred to consisted of a mere fragment, which embodied no principle and pointed to no design, the piracy of it would afford no ground of relief. But such is not the character of complainant's manuscripts. They may not be complete for publication. Some explanatory notes may be wanting, to assist the reader in comprehending the system. This information was communicated by lectures, and for the purposes of instruction in that mode, the notes were unnecessary. But the cards contain the frame work of the system. The substratum is there, and so exemplified as to show the principle upon which it is constructed. That it was valuable, is shown, from the fact of the cards having been used by the defendants in teaching the system, and in publishing them as they have done.

The facts show the piracy beyond all doubt, and that it was done under circumstances which admit of little or no mitigation. The cards, as they well knew, had been, for a number of years, and were then being used by the complainant to instruct pupils. They had learned all they knew on the subject from the complainant. They probably knew that he intended to publish his plan. But this would, to some extent, at least, supersede the necessity of personal instruction. In disregard of these considerations, and of the obligations the defendants owed to the complainant, the publication was made.

The court will allow an injunction unless a satisfactory arrangement shall be made between the parties.

CELLULOID MANUF'G CO. v. CELLONITE MANUF'G CO.

(32 Fed. 94.)

Circuit Court, D. New Jersey. July 12, 1887.

Motion for preliminary injunction.

Rowland Cox, for the motion. John R. Bennett, contra.

BRADLEY, J. The bill of complaint in this case states that the complainant was incorporated under the laws of New York in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline, adapted to different uses and purposes, and that its name has become of great consequence in the goodwill of its business, its standing, and the reputation of its goods; that, in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word "celluloid," which had never been used before, except to a limited extent by Isaiah S. and John W. Hyatt, by whom the word was coined, and who were engaged in the same manufacture at Albany, New York, and used the word as a trade-mark; and when complainant was incorporated the said Hyatts entered into its employ, and assigned to it all their rights relating to the business, good-will, and trade-mark; and complainant has ever since used the word "celluloid" as its trade-mark, by impressing or stamping it into the surface of the articles made from the manufactured product, whereby it has acquired a high reputation as denoting complainant's manufacture, and indicating goods of superior quality, as compared with like goods sold by other parties under the names of chrolithion, lignoid, pasbosene, etc.; that in 1873 complainant caused said word "celluloid" to be registered as a trade-mark in the United States patent-office, under the act in such case made and provided, and again registered in 1883, under the subsequent act. The bill then complains that the defendant, in order to deprive the complainant of its business and its rights, and to create an unfair competition, since the first day of January, 1886, has adopted the name of Cellonite Manufacturing Company, with intent that it should be mistaken for complainant's name, and intends to use it in the transaction of business similar to that of the complainant; that the similarity of names will embarrass and obstruct the business of the complainants, cause confusion and mistake, divert complainant's custom, reduce its sales, and deceive the public; that the defendant has commenced to erect works on an extensive scale for the manufacture of a compound of pyroxyline, to be put on sale under the name of "cellonite," a name purely arbitrary, and adopted to enable the defendant to sell the article as complainant's produce; that the corporators who formed the defendant company had previously been engaged in the manufacture of pyroxyline compounds under the name of "pasbosene," "lignoid," "chrolithion," etc., but selected the new name, "cellonite," in order to trade upon the complainant's reputation, and to sell its product as the complainant's, and intends to stamp its goods with the word "cellonite," in imitation of the stamp on complainant's goods, in order to sell them as complainant's manufacture. The bill prays an injunction to prevent the defendant from using the word "cellonite," or any imitation of the word "celluloid." The allegations of the bill are verified by affidavits and exhibits.

The defendant has filed an answer, in which it denies that the complainant has any right to the exclusive use of the word "celluloid;" alleges that many companies use it in their names, as "Celluloid Brush Company," "Celluloid Collar & Cuff Company," etc., which have been allowed by complainant without objection. It admits the selection and use of the word by the complainant, but denies any exclusive right to the use of it, because it has become a part of the English language to designate the substance celluloid, and the impression of the word on the articles manufactured by complainant merely indicates the substance of which they are composed. It denies that the word "cellonite" was adopted for the purpose of imitating the name of complainant, or the name stamped on the complainant's goods. It avers that the word was adopted as far back as 1883, and has been continuously used ever since, not to imitate the word "celluloid," but selected as better describing the exact nature of the pyroxyline compound used by the defendant; the same being a compound of the well-known substances cellulose and nitre, "cellonite" being merely a compound derivative of those two words; that the defendant abandoned the use of the words "pasbosene," "lignoid," etc., because those words gave no information as to the chemical constituents of the compounds designated by them. It alleges that it has for four years been engaged in manufacturing and selling goods marked "Cellonite," and until now no attempt has been made to interfere with it. To show that the word "celluloid" is a word of common use, the answer cites various patents and books, (but all subsequent to 1873,) also the rules of the patent office as to the classes of inventions, in which one of the sub classes is "Celluloid."

The only verification of the answer is the oath of J. R. France, an officer of the company, who swears that the contents are true, so far as they are within his knowledge; and, so far as stated on information and belief, he believes them to be true.

The answer virtually admits that the cor-

porators of the defendant had been engaged, before the formation of the defendant company, in the same manufacture, and had called their produce, "pasbosene," "lignoid," etc.; and that they adopted the word "cellonite," instead of those designated, for the reason, as the answer says, that it is more expressive of the constituents, cellulose and nitre. This is a somewhat singular explanation. The termination "ite," in chemistry, has a technical application nothing to do with the word "nitre;" and, notwithstanding the denial of the answer, (which, however, cannot be regarded as verified by oath,) the inference strongly presses itself that the name was adopted on account of its similarity to "celluloid," as the complainant charges.

In alleging that the word "cellonite" has been used by the defendant since 1883, the defendant, which was not incorporated until May, 1886, identifies itself with the previous association, shown by the affidavits to have been called the "Merchants' Manufacturing Company," composed of the same corporators, who abandoned the old name, and assumed the new one, for some purpose or other. The explanation given for so doing is not entirely satisfactory. Here are two facts standing side by side: First, the fact that the Celluloid Manufacturing Company,—an old, well-established concern,—is doing a large and prosperous business, with a good-will resulting from many years of successful effort, and calls the product of its manufacture "celluloid," which has become such a popular designation that, as the defendant says, it has become incorporated in the English language; secondly, the fact that the Merchants' Manufacturing Company, which produces substantially the same article, and calls it by different names, "pasbosene," "lignoid," etc., (with what success we are not told,) suddenly changes its name to that of Cellonite Manufacturing Company, and calls its produce "cellonite." It will take a great deal of explanation to convince any man of ordinary business experience that this change of name was not adopted for the purpose of imitating that of the old, successful company.

It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good-will. Fair competition in business is legitimate, and promotes the public good; but an unfair appropriation of another's business, by using his name or trade-mark, or an imitation thereof calculated to deceive the public, or in any other way, is justly punishable by damages, and will be enjoined by a court of equity. The question before me is whether the law has been violated in the present case.

First. As to the imitation of the complainant's name. The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name "Cellonite Manufacturing Company" is sufficiently similar to that of the "Celluloid Manufacturing Company" to amount to an infringement of the complainant's trade name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead.

Secondly. As to the complainant's alleged right to the exclusive use of the word "celluloid" as a trade-mark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word "celluloid" is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trade-mark; and, secondly, if it is a trade-mark the defendant does not infringe it by the use of the word "cellonite."

As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word "flour" as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word "celluloid" has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of

the substance manufactured, can take away the complainant's right. It seems to me that it cannot.

As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one,—it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles. The complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactures celluloid. But this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and, if it has such right, (which it seems to me it has,) then such a use by the defendant of the word "celluloid" itself, or of any colorable imitation of it, would be an invasion of the complainant's right. As a trade-mark it indicates that the article bearing it is the product of the complainant's manufacture. If another party uses it in that way, it indicates a falsehood, and is a fraud on the public, and an injury to the complainant. The essence of the law of trade-marks is that one man has no right to palm off, as the goods or manufacture of another, those that are not his. This is done by using that other's trade-mark, or adopting any other means or device to create the impression that goods exhibited for sale are the product of that other person's manufacture when they are not so.

The subject is well illustrated by the case of McAndrew v. Bassett, 4 De Gex, J. & S. 380. The plaintiffs produced a new article of liquorice, and stamped the sticks with the word "Anatolia," some of the juice from which they were made being brought from Anatolia, in Turkey. The article becoming very popular, the defendants stamped their liquorice sticks with the same word. Being sued for violation of plaintiffs' trade-mark, one of their defenses was that no person has a right to adopt as a trade-mark a common word, like the name of a country where the article is produced. Lord Chancellor Westbury said: "That argument is merely the repetition of the fallacy which I have frequently had occasion to expose. Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a particular vendible, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." Page 386.

Another case throwing light on the subject is that of Singer Machine Manuf'g Co. v. Wilson, 3 App. Cas. 376. There the defendant, a manufacturer and vendor of sewing-machines, inserted in his price-list, among other articles for sale, the "Singer Sewing-Machine," and sold machines by that name, but having his own trade-mark upon them. The plaintiff sued him on the ground that by a Singer sewing-machine was understood in the community a sewing-machine made by Singer, the inventor, or by the plaintiff, his assignee and successor in business. The plaintiff contended, therefore, that the advertisement was a fraud on the public, and an invasion of its exclusive right to the name "Singer." The defendant contended that the terms "Singer Sewing-Machine" meant a particular kind of machine, (which he described,) irrespective of who manufactured it; that the word "Singer" had come to be descriptive in its character, and would not have the effect attributed to it by the plaintiff. The judges who delivered opinions in the case, held that if the use of the name "Singer" gave the public to understand that the defendant sold machines made by the plaintiff, it was a wrong done to the plaintiff; but that if the name had come into common use as a name of a particular kind of machine, irrespective of the maker, the defendant had a right to use it in his advertisements in that sense, using his own trade-mark on the article itself; and it was held by all the judges that it was a matter to be determined by evidence whether the use of the name in the advertisement had the one effect or the other.

This, it will be observed, was a case of advertising, and not of imitating a trade-mark. Still, if it had the same effect, it was held to be equally culpable. The case does not decide that, if the word "Singer" had been the plaintiff's trade-mark, any change in its use would have affected such trade-mark, but does decide that an extension of its use might render the word harmless in an advertisement.

The defendant's counsel in the present case placed great reliance on the decision in Cloth Co. v. Cloth Co., 11 H. L. Cas. 523. After carefully reading that case, I do not see that it necessarily governs the present. No question was made as to the names of the companies. The trade-mark there was a large circular label stamped upon the cloth, containing, within its circumference, the name of the former company which carried on the manufacture, and the places where it had been carried on, thus: "Crockett International Leather Cloth Company, Newark, N. J., U. S. A.; West Ham, Essex, England." Within the circle were, first, the figure of an eagle, displayed, under the word "Excelsior," and then certain announcements in large type, as follows: "Crockett & Co. Tanned Leather Cloth; patented Jan'y 24, '58. J. R. & C. P. Crockett, Manufacturers." The court held this label to be partly trade-mark and

partly advertisement; and, as the cloth was not patented, and J. R. & C. P. Crockett were not the manufacturers, the court was inclined to agree with the lord chancellor that these statements invalidated the label as a trade-mark; but Lords Cranworth and Kingsdown preferred to place their decision against the plaintiff on the ground that the defendants' label did not infringe it. They pointed out differences in figure, and showed that the announcements were different; and the defendants' announcement being "Leather cloth, manufactured by their manager, late with J. R. & C. P. Crockett & Co.," without any reference to a patent, Lord Kingsdown said: "The leather cloth, of which the manufacture was first invented or introduced into the country by the Crocketts, was not the subject of any patent. The defendants had the right to manufacture the same article, and to represent it as the same with the article manufactured by the Crocketts; and, if the article had acquired in the market the name of Crocketts' leather cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture Crocketts' leather cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by the Crocketts or by any person to whom the Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement, or by adopting the trade-mark of Crockett & Co., or of the plaintiffs to whom the Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiff as to be calculated to mislead incautious purchasers."

It seems to me that the true doctrine could not be more happily expressed than is here done by Lord Kingsdown. There is nothing in the case, nor in the opinions of any of the judges, adverse to the claim of the complainant.

There is a case in the New York Reports (Selchow v. Baker, 93 N. Y. 59) which comes very near to that now under consideration. That was the case of "sliced animals," and other "sliced" objects, being a term used by the plaintiff as a trade-mark to designate certain puzzles manufactured and sold by them, in which pictures of animals, etc., on cardboard, were sliced up in pieces, and the puzzle was to put the pieces together and make the animal. The label "Sliced Animals," etc., was used by the plaintiffs on all boxes of these goods sold by them. The defendants infringed, and the question was whether this kind of designation could avail as a trade-mark. Judge Rapallo, in delivering the opinion of the court, after reviewing many cases on the subject, concludes as follows: "Our conclusion is that where a manufacturer has invented a new name, consisting either of a new word or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured by him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article."

This case is so directly in point that it seems unnecessary to look further. I think it perfectly clear, as matter of law, that the complainant is entitled to the exclusive use of the word "celluloid" as a trade-mark.

The only question remaining to be considered, therefore, is whether the defendant, by the use of the word "cellonite," as a trade-mark, or impression upon its goods as a trade-mark, does or will infringe the trade-mark of the complainant. Is the word "cellonite" sufficiently like the word "celluloid," when stamped upon the manufactured articles, to deceive incautious purchasers, and to lead them to suppose that they are purchasing the products of the same manufacturers as when they purchased articles marked "celluloid?" I think this question must be answered in the affirmative. I think that, under the circumstances of the case, the word "cellonite" is sufficiently like the word "celluloid" to produce the mischief which is within the province of the law. I say, under the circumstances of the case. By that I mean the previous nomenclature applied to the articles as manufactured by different persons. The complainant has always stamped its goods with the word "celluloid." Other manufacturers have called the product as manufactured by them by names quite unlike this, as "pasbosene," "lignoid," "ehrolithion," etc.; so that a wide difference in designation and marking has existed between the complainant's goods and those of all others. The adoption now of a word and mark so nearly like the complainant's as "cellonite" cannot fail, it seems to me, to mislead ordinary purchasers, and to deceive the public.

The defendant, however, sets up two grounds of defense against the application for an injunction outside of the merits of the case: First, that the complainant has acquiesced in the use of the word "celluloid" in the names of a great number of other companies, several of which are enumerated in the answer, such as the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like; and, by such acquiescence, has lost any right to complain of such use by other companies. But it is obvious that such special names, indicating confinement to a particular branch of the trade, are wholly unlike the complainant's general

name of "Celluloid Manufacturing Company." Besides this, it is altogether probable, as we gather from one of the affidavits, that these branch companies are mostly licensees of the complainant, and very properly use the word "celluloid" in their names. We think that this defense cannot justly prevail.

The other is of somewhat the same character,—supposed laches and acquiescence on the part of the complainant, in allowing the defendants themselves, for three or four years prior to the suit, to use the word "cellonite," stamped on their articles of manufacture, and in their business name. How the defendant could have done this before its own existence is difficult to understand. But, suppose it is meant that it was done by the corporators and predecessors of the defendant, there is no proof that it ever came to the knowledge of the complainant; and the fact that the previous name used under the former corporate organization was that of the "Merchants' Manufacturing Company" is sufficient to afford the complainant prima facie ground of excuse for not having learned of the alleged use of the word "cellonite," if it ever was used. I do not think that either of these defenses can avail the defendant. My conclusion is that the complainant, as the case now stands, is, in strictness, entitled to an injunction to restrain the defendant from using the name "Cellonite Manufacturing Company," or any other name substantially like that of the complainant; and from using the word "cellonite" as a trade-mark or otherwise, upon the goods which it may manufacture or sell, or any other word substantially similar to the word "celluloid," the trade-mark of the complainant.

But my great reluctance to grant a preliminary injunction for suppressing the use of a business name, or of a trade-mark, in any case in which the matter in issue is a subject for fair discussion, and admits of some doubt in the consideration of its facts, induces me to withhold the order for the present, on condition that the defendant will agree to be ready to submit the cause for final hearing at the next stated term of the court, which commences on the fourth Tuesday of September. It is possible that additional evidence, or a fuller verification of the allegations of the answer, may so modify the facts of the case presented for consideration as to lead to a change of views on the question of infringement, or of excuse therefor. At all events, it will be more satisfactory not to render judgment in the case until the defendant has been fully heard, and when it would have a right of immediate appeal. Should the defendant not be ready for a hearing at the time indicated, the present motion may be renewed without additional argument, or the complainant may take such other course as it shall be advised.

At the September term no further evidence was offered, and an order for injunction was granted without opposition.

MITCHELL v. GILE.

(12 N. H. 390.)

Superior Court of New Hampshire. Hillsborough. Dec. Term, 1841.

Assumpsit by one Mitchell against one Gile, one of the charges being for ten cords of wood sold and delivered. It appeared on the trial that plaintiff had on his land a lot of seasoned wood, of which defendant wished to borrow a portion in order to complete a boat load. Plaintiff gave him permission to take what he wanted for the purpose, and, as defendant proposed to cut some wood from his land near plaintiff's it was agreed that the latter should have of it as much as defendant might take of plaintiff's wood. Defendant accordingly took ten cords of plaintiff's wood, and plaintiff afterwards demanded a like quantity of defendant, which, however, the latter neglected to deliver. Defendant objected that this evidence did not support the declaration, and that plaintiff should have declared on the original contract.

Bowman & Porter, for plaintiff. S. D. Bell, for defendant.

GILCHRIST, J. There is a class of cases where it is unnecessary to declare upon the special contract which the parties may have made. Where one party agrees to do a certain thing, and the other party agrees to pay a sum of money, and the thing or duty is performed, but the other party refuses to pay the money, an action lies for the money, because a debt has accrued, and nothing remains to be done but to pay it. There seems to be no reason in such a case why a general count should not be sufficient for the recovery of the money due. The plaintiff's claim does not then sound in damages, but is for a definite sum. Such is the principle recognized in Bank of Columbia v. Patterson's Adm'r, 7 Cranch, 303; Williams v. Sherman, 7 Wend. 109; Jewell v. Schroeppel, 4 Cow. 564; Felton v. Dickinson, 10 Mass. 287; Sheldon v. Cox, 3 Barn. & C. 420, and in the cases generally, whenever the point is adverted to.

There is another class of cases, where the only remedy for the plaintiff is by an action on the special agreement, because it still remains open and unrescinded. In general, where goods are sold to be paid for wholly or in part by other goods, or by the defendant's labor, or otherwise than in money, the action must be on the agreement, and for a breach of it, and not for goods sold and delivered. And this is especially the case unless there be a sum of money due the plaintiff on the contract, and that part of it which is for something else than money has been performed by the defendant, so that there is nothing to be done which can be the subject of future litigation. In such case perhaps the plaintiff may declare that the defendant was indebted to him in a sum of money for goods sold and delivered to him in exchange. But in a case tried before Mr. Justice Buller, where the declaration was for goods sold and delivered, and the contract proved was, that the goods should be paid for partly in money and partly in buttons, the plaintiff was nonsuited, for not declaring on the special agreement. Harris v. Fowle, cited in the case of Barbe v. Parker, 1 H. Bl. 287. There is also an old case on this point in Palmer's Reports, 364, Brigs' Case, where one in possession of land promised to make a lease of it, and took a fine for the lease, after which, and before the lease was made, he was evicted from the land. It was held that debt did not lie to recover the money paid for the fine; and the principle of the decision seems to have been, that the contract to make the lease being still subsisting, the plaintiff should have sued upon that contract. And the authorities are nearly uniform, that where goods are delivered on a special agreement, a mere failure to perform, by the defendant, does not rescind the agreement; but it is still executory and subsisting, and the remedy is by an action upon it. Raymond v. Bearnard, 12 Johns. 274; Jennings v. Camp, 13 Johns. 94; Clark v. Smith, 14 Johns. 326; Robertson v. Lynch, 18 Johns. 451; Dubois v. Canal Co., 4 Wend. 289; Talver v. West, Holt, 178. And in Weston v. Downes, 1 Doug. 23, the court expressly held, that if a contract be rescinded, an action for money had and received will lie for money paid under it; but if the contract be broken, this action will not lie, but an action for a breach of the contract must be brought. This principle is fully recognized in Towers v. Barrett, 1 Term R. 133, and in Davis v. Street, 1 Car. & P. 18. Opposed to the general current both of the English and American authorities on this point, are the intimations and the reasoning of Mr. Justice Cowen, in the case of Clark v. Fairfield, 22 Wend. 522. He expresses the opinion that the cases will justify the position, that though the compensation for the goods, or other thing advanced, is to be rendered in services, or some other specific thing, if the party promising to render be in default, indebitatus assumpsit will lie for the price of the thing advanced. He admits that this position goes beyond any direct adjudication in England, although he thinks it may be maintained by the principle of many cases there, and that it is just that in such a case a general count should be maintained. He cites, with approbation, the case of Way v. Wakefield, 7 Vt. 223, 228, where Mr. Justice Collamer says, that "whenever there are goods sold, work done, or money passed, whatever stipulations may have been made about the price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count may be maintained." The action was for harness sold, to be paid for in lumber at a specified time. There being a default in payment, the court allowed the general count for harness sold. Mr. Justice Cowen admits that "the learned judge certainly

did not cite any direct authority for thus applying the rule," and we are not aware that any authority exists for such an application of it. To the rule, as above stated, there may, perhaps, be no objection. The question in cases of such a character always is, whether the money has become due; and if no more be meant than that a general count will lie, where a contract has been performed, and has resulted in an obligation to pay money, then we assent to the correctness of the position. Of the propriety of the application of the rule to the facts in the case of Way v. Wakefield, we may be permitted, respectfully, to express a doubt. It is true that a general count may sometimes be maintained, where the goods were to be paid for by other goods. Of this character is the case of Forsyth v. Jervis, 1 Starkie, 437. The plaintiff sold the defendant a gun for forty-five guineas, and agreed to take of the defendant a gun, in part payment, at the price of thirty guineas. Lord Ellenborough held that as here was a sale of goods, to be paid for in part by other goods at a stipulated price, upon the refusal of the purchaser to pay for them in that mode, a contract resulted to pay for them in money, and that the forty-five guineas might be recovered under a count for goods sold. This case has every characteristic of a sale. The plaintiff sold the gun for a specified price; the defendant agreed to give, in part payment, another gun for a stipulated price, and was bound either to deliver the gun or pay its price. As he refused to deliver the gun, a decision that he was indebted to the plaintiff for its price accords with the general tone of the authorities. In relation to the case of Clark v. Fairchild, it is also to be remarked, that in the subsequent case of Ladue v. Seymour, 24 Wend. 62, Mr. Justice Bronson says, that where there is a subsisting special contract between the parties in relation to the thing done, all the cases agree that the contract must control, and that the remedy is, in general, upon that, and not upon the common counts in assumpsit.

But apart from authority, and from technical reasoning depending upon authority for much of its force, it is proper that the form of the remedy should be adapted to the actual state of facts. In no other mode of declaring can the proper rule of damages be applied, where there has been a breach of a special contract. If goods are sold and delivered, the price, or value, at the time of the transaction, is the measure of damages, unless there be something showing a different intention by the parties. The plaintiff is entitled to the value of the goods he has parted with, at the time, and to nothing more; nor can the defendant be compelled to pay more than the value at the time he received them. Both parties act with reference to the value at the time of the transaction. But where a party agrees, but neglects to deliver goods at a specified time, the damages for the non fulfillment of such an agreement are to be calculated according to their value at the time they should have been delivered. If the articles have fallen in price, the defendant will be entitled to the benefit of such a change in the market; if they had risen, the increase in value will belong to the plaintiff. There is, therefore, a substantial reason why the rights of both parties can be better secured, by declaring specially upon a breach for the non-fulfilment of a contract to deliver goods, than by declaring upon the general count; and this reason probably has had its effect in causing the forms of the remedy to be kept distinct. Leigh v. Paterson, 8 Taunt. 540; Gainsford v. Carroll, 2 Barn. & C. 624; Shaw v. Nudd, 8 Pick. 9.

If, where goods are sold to be paid for otherwise than in money, and the vendee neglects to perform, an action must be brought on the special agreement, there is a still stronger reason for adopting the same form of the remedy where the goods are not sold, but exchanged. In the former case, the goods are at least sold; and so far the evidence supports the declaration. But the latter case has no feature in common with a contract, necessary to support a count for goods sold and delivered. Now the transaction between those parties was, properly speaking, an agreement for an exchange of goods, and not for a sale. Blackstone says (2 Comm. 446), "If it be a commutation of goods for goods, it is more properly an exchange; if it be a transferring of goods for money, it is called a sale." Here the defendant agreed to deliver to the plaintiff as much wood as he received of him. This agreement the defendant failed to perform. There is, then, a breach of the special agreement, and there is nothing else. The injury sustained by the plaintiff is to be compensated by a recovery of damages for the breach. There is nothing in the case that shows a sale of the wood by either party to the other; nor can the transaction be considered a sale, without a disregard of all the authorities which distinguish actions sounding in damages for a breach of contracts, from actions to recover a definite sum as the purchase money for goods sold.

Nor is the case altered by the fact that no suit could be maintained without a demand. The wood was to be delivered to the plaintiff at such time as he should desire it. The plaintiff would have a right to the performance of the agreement whenever he should notify the defendant that he desired the wood. There could be no breach of the agreement by the defendant until after this notice; and a refusal to deliver was a breach, for which an action is maintainable. That a demand, in a given case, is necessary before a suit can be maintained on a special contract, by no means proves that the demand alters the form of the remedy to which the plaintiff is entitled. It might as well be said, that because an action on a special contract could not be maintained until a given period had elapsed, therefore the lapse of time altered the form of the remedy.

Undoubtedly, a demand and refusal may, in some cases, have this effect, but the result does not necessarily follow because the demand must be made.

The opinion of the court is, that the plaintiff has misconceived his remedy, and that this action cannot be maintained.

Plaintiff nonsuit.

MALLORY v. WILLIS.

(4 N. Y. 76.)

Court of Appeals of New York. 1850.

Replevin for seventy-five barrels of flour. The plaintiffs had contracted with the defendant, Christopher Willis, to deliver at the Hopeton Mills a quantity of good merchantable wheat to be manufactured into flour on the following terms: For every four bushels and fifteen pounds of wheat, Christopher Willis was to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels to be furnished by the plaintiffs. Said Willis was to guarantee the inspection of the flour, and if scratched, to pay all losses sustained thereby. The plaintiffs were to have all the offals, or feed, etc.; the said Willis to store the same until sold. The plaintiffs were to pay sixteen cents for each barrel so manufactured, and if they made one shilling net profit on every barrel, they were to pay said Willis two cents per barrel extra.

The plaintiffs delivered thirty-two thousand five hundred and eighty-six bushels and four pounds of wheat at the Hopeton Mills, and received seven thousand six hundred and sixty-seven barrels and one hundred and fifty-six pounds of flour, pursuant to the agreement. They brought this action of replevin against Christopher Willis and Charles P. Willis, to recover the surplus of seventy-five barrels still due under the contract. The defendant insisted that the title to the wheat passed to Willis by force of the delivery under the contract, and that, therefore, the plaintiffs could not recover the flour manufactured from the same wheat. Judgment was rendered in favor of the plaintiffs by Pratt, J., and affirmed by the general term. The defendants brought this appeal.

J. S. Glover, for appellants. S. H. Wells, for respondents.

HURLBUT, J. If the contract was one of bailment, and if by a proper construction of it the defendants were entitled to the surplus flour, I think the burden would have rested on them of showing that the article in question was such surplus, after the plaintiffs had established that it was the produce of their wheat; so that taking the most favorable view for the defendants, there was no error in point of law in this branch of the decision at the circuit, which would entitle them to except, and the only question for our decision is, whether the contract and the delivery under it amounted to a sale or a bailment of the wheat?

The defendants refer us to that part of the contract which binds them to deliver a barrel of superfine flour and to guarantee its inspection, for every four and one-fourth bushels of wheat, which it is alleged, if the plaintiffs' construction is to prevail, is not only an unreasonable and hard contract for the defendants, but is altogether inconsistent with the notion of a bailment; for it is asked, if it were not a sale, why should the defendants guarantee that the flour should bear inspection, or why should they agree for a certain quantity of wheat to deliver a barrel of flour? It may be remarked in answer to this, that the defendants being experienced millers must be deemed to have contracted with a knowledge of the quantity of wheat required to yield a barrel of flour; and as the plaintiffs were obliged by the contract to deliver good merchantable wheat, it seems but reasonable that the defendants should have been required so to manufacture it, as that the flour would bear inspection; that these provisions must be viewed in the connection in which they stand, and receive a construction which shall make them harmonize with the whole expression of the contract between the parties; and that taking the whole agreement into view, they seem to have been inserted at the suggestion of the plaintiffs, for the purpose, in part, at least, of causing a skillful and prudent manufacture of the wheat into flour; and even if they were employed to define the quantity of flour to be returned, they would not overbear the other provisions of the agreement, which import very clearly an understanding between the parties that the identical wheat which was delivered by the plaintiffs should be manufactured into flour for their benefit; that they were to pay for the work a stipulated price in money, and to receive the manufactured article, together with the offals or feed, which should come from the wheat. The language of the agreement will hardly bear a different construction. The plaintiffs by its terms were to deliver wheat to be manufactured into flour, which Willis agreed to do—i. e., he agreed to manufacture the wheat so to be delivered into flour. But this provision would be entirely out of place in an exchange of wheat for flour. The plaintiffs were to furnish the barrels in which it was to be packed; thus providing every material for the completion of the work, and leaving nothing for Willis to do but to perform the proper labor of a manufacturer. The plaintiffs were moreover to have all the offals or feed, etc.; not such a quantity of offals as would proceed from like quantity of other wheat, but the offals or feed—i. e., such as should come of grinding the very wheat delivered to the miller, who was also to store the feed until the plaintiffs could sell it. And in case Willis performed on his part, i. e., in case he manufactured the wheat so delivered into flour, with the requisite skill and prudence, the plaintiffs were to pay him at the rate of sixteen cents, or in a certain contingency eighteen cents per barrel, as a compensation for the labor of manufacture. Proper effect cannot be given to these provisions of the agreement, without treating it as a contract by the defendants to manufacture the plaintiffs' wheat into flour, to deliver to them the spe-

cific proceeds, at least to the extent mentioned in the contract, and to receive in satisfaction for the work the stipulated price per barrel. Contracts of this sort, which have received a different construction, will be found to have differed very materially from the present in their terms, as will be seen by a brief reference to the leading cases.

In Buffum v. Merry, 3 Mason, 478, Fed. Cas. No. 2,112, the plaintiff owned two thousand nine hundred pounds of cotton yarn, and agreed to let one Hutchinson take it at the price of sixty-five cents per pound, and he was to pay the plaintiff the amount in plaids, at fifteen cents per yard. H. was to use the plaintiff's yarn in making the warp of the plaids, and to use for filling other yarn of as good a quality. Under this contract the yarn was delivered to H., who failed without having manufactured it into plaids, and assigned it with other property for the benefit of his creditors. The question was whether the property in the yarn passed to H. by the delivery; and Story, J., said that it did; holding that it was not a contract whereby the specific yarn was to be manufactured into cloth, wholly for the plaintiff's account and at his expense, and nothing but his yarn was to be used for the purpose. That in such a case the property might not have changed; but here the cloth was to be made of other yarn as well as the plaintiff's. The whole cloth when made was not to be delivered to him, but so much only as at fifteen cents per yard would pay for the plaintiff's yarn at sixty-five cents per pound. That this was a sale of the yarn at a specified price, to be paid for in plaids at a specified price. See, also, Story, Bailm. § 283; Jones, Bailm. p. 102.

In Ewing v. French, 1 Blackf. 353, the plaintiff delivered a quantity of wheat to the defendants, at their mill, to be exchanged for flour. The wheat was thrown by the defendants into their common stock, and the mill was subsequently destroyed by fire. The court held this to be a contract of exchange, or a sale of the wheat to be paid for in flour; that from the moment the defendants received the wheat they became liable for the flour; that the wheat itself was not to be returned, nor the identical flour manufactured from it. And this was very well, for the contract was, by its express terms, one of exchange.

In Smith v. Clark, 21 Wend. 83, one Hubbard owned a flouring-mill, and the plaintiffs agreed with him to deliver wheat at his mill, and he agreed that for four bushels and fifty-five pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection. Here was nothing which imported a delivery of wheat for the purpose of being manufactured, nor any agreement to make it into flour and to receive a compensation for so doing, at a certain price per barrel; and it is obvious that Hubbard might have delivered any flour of the quality stipulated for, in satisfaction of the contract. Hence it was held that the delivery of the wheat under this agreement amounted to an exchange of the wheat for flour, and that Hubbard on receiving the wheat became indebted to the plaintiffs.

In Norton v. Woodruff, 2 N. Y. 153, the defendant agreed to "take" wheat and to "give" them one barrel of superfine flour for every four bushels and thirty-six pounds of wheat; but here also there was the absence of a delivery for the purpose of being manufactured, no compensation was agreed to be given to the miller for his work, there was nothing about offals, and nothing about the wheat owner's furnishing barrels in which to pack the flour. On the contrary, the miller in this case was to furnish the barrels. This court gave proper effect to the language of this contract by holding, that the miller, by agreeing to take wheat and give flour in return, had bargained for an exchange of wheat for flour; that any flour of the quality described in the contract would have answered its requirements, and that the property of the wheat passed upon its delivery.

But in the case under review, Willis contracted to manufacture the wheat delivered, and to receive compensation for his labor. The flour, by which was intended the produce of the manufacture, was to be delivered to the plaintiffs in their own barrels, and the offals were to be kept in store as their property. These features give a character to this contract so materially different from that which is borne by the agreements which have received a judicial construction in the cases referred to, that with the fullest concurrence in the justice of those decisions, it may be held that the defendants were bailees and not purchasers of the plaintiffs' wheat, and bound to restore its proceeds to them. I am, therefore, of opinion that the judgment of the supreme court ought to be affirmed.

JEWETT, J., also delivered an opinion in favor of affirming the judgment.

RUGGLES, GARDINER, PRATT, and TAYLOR, JJ., concurred.

BRONSON, C. J., and HARRIS, J., dissented.

HARKNESS v. RUSSELL & CO.

(7 Sup. Ct. 51, 118 U. S. 663.)

Supreme Court of the United States. Nov. 8, 1886.

Appeal from the supreme court of the territory of Utah.

The facts fully appear in the following statement by Mr. Justice BRADLEY:

This was an appeal from the supreme court of Utah. The action was brought in the district court for Weber county, to recover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts, and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the second of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of $4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to-wit: "Salt Lake City, October 2, 1882. On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1,026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, $300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due, and take possession of said engine and saw-mill when they may deem themselves insecure even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may, without sale, indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt, or claim as exempt, any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be enacted. P. O., Oxford, Oneida County, Idaho territory. $300. Phelan & Ferguson." Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The territory of Idaho has a law relating to chattel mortgages [act of January 12, 1875], requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached that it is bona fide, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson and of Russell & Co. that the title to the said property should not pass from Russell & Co. until all the notes were paid. Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant, and gave judgment for the plaintiff. The supreme court of the territory affirmed this judgment. 7 Pac. 865. This appeal was taken from that judgment.

Parley L. Williams, (James N. Kimball and Abbot R. Heywood, on the brief,) for appellant. Charles W. Bennett, for appellee.

Mr. Justice BRADLEY, after stating the facts as above reported, delivered the opinion of the court.

The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is,

whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit, and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases.

In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established. (1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; (2) that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackb. Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property; and, if they do so, their intention is fulfilled." Blackb. Sales, 167.

Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to-wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales (2d Ed.) 236; Id. (3d Ed.) § 320. The author cites for this proposition Bishop v. Stillito, 2 Barn. & Ald. 329, note a; Brandt v. Bowlby, 2 Barn. & Adol. 932; Barrow v. Coles (Lord Ellenborough) 3 Camp. 92; Swain v. Shepherd (Baron Parke) 1 Moody & R. 223; Mires v. Solebay, 2 Mod. 243.

In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed; the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of Lamond v. Duvall, 9 Q. B. 1030; and many more cases could be cited.

In Ex parte Crawcour, L. R. 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10, in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid; and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeals held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of Crawcour v. Salter, L. R. 18 Ch. Div. 30.

In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel-keepers holding their furniture on hire. But they show that the intent of the parties will be recognized

and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 Jac. I. c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case presents a fair illustration of the English law as based upon the statutes of bankruptcy. In Horn v. Baker, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demised the same to J. & S. in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term, and the apparatus and utensils, with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the bankrupt act, as being in their possession, order, and disposition as reputed owners; and the court held that they did; but that, if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in Holroyd v. Gwynne, 2 Taunt. 176.

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and, when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In Hussey v. Thornton, 4 Mass. 404 (decided in 1808), where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee.

This case was followed in 1822 by that of Marston v. Baldwin, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay $100 (part of the price) which condition was not performed, though the goods were delivered. Holt had paid $75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained.

In Barrett v. Pritchard, 2 Pick. 512, the court said: "It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated that 'the wool, before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * * The case from Taunton (Holroyd v. Gwynne) was a case of a conditional sale; but the condition was void as against the policy of the statute 21 Jac. I. c. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners

for the benefit of his creditors. The case of Horn v. Baker, 9 East, 215, also turned on the same point, and nothing in either of these cases has any bearing on the present question."

In Coggill v. Hartford & N. H. R. Co., 3 Gray, 545, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a bona fide purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

This case was followed in Sargent v. Metcalf, 5 Gray, 306; Deshon v. Bigelow, 8 Gray, 159; Whitney v. Eaton, 15 Gray, 225; Hirschorn v. Canney, 98 Mass. 149; and Chase v. Ingalls, 122 Mass. 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of Forbes v. Marsh, 15 Conn. 384 (decided in 1843), in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of Hart v. Carpenter, 24 Conn. 427, where the question arose upon the claim of a bona fide purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale and to his creditors; though there has been some diversity of opinion in its application to bona fide purchasers from such vendee.

As early as 1822, in the case of Haggerty v. Palmer, 6 Johns. Ch. 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English bankrupt act did not apply here. The chancellor remarked, however, that "if the goods had been fairly sold by P. [the conditional vendee], or if the proceeds had been actually appropriated by the assignees before notice of this suit and of the injunction, the remedy would have been gone."

In Strong v. Taylor, 2 Hill, 326, Nelson, C. J., pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canal-boat for a certain sum, to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full, with interest. Before the money was all paid the boat was seized under an execution against the vendee; and, in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained in banc upon the authority of the Massachusetts case of Barrett v. Pritchard, 2 Pick. 512.

In Herring v. Hoppock, 15 N. Y. 409, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." Comstock, J., said that, if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage; but he

considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of Smith v. Lynes, 5 N. Y. 41, and Wait v. Green, 35 Barb. 585, on appeal, 36 N. Y. 556, it was held that a bona fide purchaser, without notice from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of Ballard v. Burgett, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt, and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See Cole v. Mann, 62 N. Y. 1; Bean v. Edge, 84 N. Y. 510.

We do not perceive that the case of Dows v. Kidder, 84 N. Y. 121, is adverse to the ruling in Ballard v. Burgett. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price (which was to be cash, the same day), yet they indorsed and delivered to the purchaser the evidence of title, namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course, the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of Parker v. Baxter, 86 N. Y. 586, was precisely similar to Dows v. Kidder; and the same principle was involved in Farwell v. Importers' & Traders' Bank, 90 N. Y. 483, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself. The legal title passed; and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons without notice. George v. Stubbs, 26 Me. 243; Sawyer v. Fisher, 32 Me. 28; Brown v. Haynes, 52 Me. 578; Boynton v. Libby, 62 Me. 253; Rogers v. Whitehouse, 71 Me. 222; Sargent v. Gile, 8 N. H. 325; McFarland v. Farmer, 42 N. H. 386; King v. Bates, 57 N. H. 446; Hefflin v. Bell, 30 Vt. 134; Armington v. Houston, 38 Vt. 448; Fales v. Roberts, 38 Vt. 503; Duncans v. Stone, 45 Vt. 123; Moseley v. Shattuck, 43 Iowa, 540; Thorpe v. Fowler, 57 Iowa, 541, 11 N. W. 3.

The same view of the law has been taken in several other states. In New Jersey, in the case of Cole v. Berry, 42 N. J. Law, 308, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in Cole v. Berry, 42 N. J. Law, 314, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to bona fide purchasers. Chamberlain v. Smith, 44 Pa. St. 431; Rose v. Story, 1 Pa. St. 190; Martin v. Mathiot, 14 Serg. & R. 214; Haak v. Linderman, 61 Pa. St. 499." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing,—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent per se."

In this connection, see the case of Copland v. Bosquet, 4 Wash. C. C. 588, Fed. Cas. No. 3,212, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a bona fide purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought

to our attention is that of Call v. Seymour, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the separator and horse-power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due, and take possession of said separator and horse-power, at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities pro and con duly considered by the court, which sustained the condition expressed in the contract, and affirmed the judgment for the plaintiff. See, also, Sanders v. Keber, 28 Ohio St. 630.

The same law prevails in Indiana. Shireman v. Jackson, 14 Ind. 459; Dunbar v. Rawles, 28 Ind. 225; Bradshaw v. Warner, 54 Ind. 58; Hodson v. Warner, 60 Ind. 214; McGirr v. Sell, Id. 249. The same in Michigan. Whitney v. McConnell, 29 Mich. 12; Smith v. Lozo, 42 Mich. 6, 3 N. W. 227; Marquette Manuf'g Co. v. Jeffery, 49 Mich. 283, 13 N. W. 592. The same in Missouri. Ridgeway v. Kennedy, 52 Mo. 24; Wangler v. Franklin, 70 Mo. 659; Sumner v. Cottey, 71 Mo. 121. The same in Alabama. Fairbanks v. Eureka, 67 Ala. 109; Sumner v. Woods, Id. 139. The same in several other states. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to Benj. Sales (4th Ed.) § 320, pp. 329–336; and Mr. Freeman's note to Kanaga v. Taylor, 70 Am. Dec. 62, 7 Ohio St. 134. It is unnecessary to quote further from the decisions. The quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the supreme court of that state is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the mean time, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a bona fide purchaser, or an execution creditor of the latter, is entitled to protection as against the claim of the original vendor. Brundage v. Camp, 21 Ill. 330; McCormick v. Hadden, 37 Ill. 370; Murch v. Wright, 46 Ill. 488; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such.

In the case of Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that, if the rent was duly paid, the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons unless the agreement was recorded (which it was not in proper time), decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in Green v. Van Buskirk, 5 Wall. 307, and 7 Wall. 139, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to

this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that state on the subject under consideration.

The case of Hervey v. Rhode Island Locomotive Works is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion, for it is apparent that the only points decided in that case were—First, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors after its delivery to the vendees, whereby the latter became the ostensible owners, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in Heryford v. Davis, 102 U. S. 235, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of Hervey v. Rhode Island Locomotive Works, will be found to support their views. The whole question in Heryford v. Davis was as to the construction of the contract. This was in the form of a lease, but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company." The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that, at the time of and prior to the sale, he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners; but as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid as well against third persons

as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made, has been performed.

The judgment of the supreme court of the territory of Utah is affirmed.

WOOD v. BOYNTON et al.

(25 N. W. Rep. 42, 64 Wis. 265.)

Supreme Court of Wisconsin. Oct. 13, 1885.

Appeal from circuit court, Milwaukee county.

Johnson, Rietbrock & Halsey, for appellant. N. S. Murphey, for respondents.

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the twenty-eighth of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out." In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,—worn pointed at one end; it was nearly straw color,—a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action. The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the

sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580. There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Kennedy v. Panama, etc., Mail Co., supra, 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133; Ship's Case, 2 De G., J. & S. 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See Street v. Blay, supra.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See Stettheimer v. Killip, 75 N. Y. 287; Etting v. Bank of U. S., 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Wheat v. Cross, 31 Md. 99; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503-511. However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.

SHERWOOD v. WALKER et al.

(33 N. W. 919, 66 Mich. 568.)

Supreme Court of Michigan. July 7, 1887.

Error to circuit court, Wayne county; Jennison, Judge.

C. J. Reilly, for plaintiff. Wm. Aikman, Jr., (D. C. Holbrook, of counsel,) for defendants and appellants.

MORSE, J. Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff. The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield, and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter: "Walkerville, May 15, 1886. T. C. Sherwood, President, etc.—Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer. Yours, truly, Hiram Walker & Sons." The order upon Graham inclosed in the letter read as follows: "Walkerville, May 15, 1886. George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with the cow, and have her weighed. Yours, truly, Hiram Walker & Sons." On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following. On the nineteenth of May, the plaintiff wrote Graham as follows: "Plymouth, May 19, 1886. Mr. George Graham, Greenfield—Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning. Yours, etc., T. C. Sherwood." Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of

their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy, at $90, and Rose 2d at $80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order. If they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, ofttimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over $50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest, or in part payment, or where the seller has signed some note or memorandum in writing. How. St. § 6186. Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yards, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yards. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff. Payment was not to be a concurrent act with the delivery, and therein this case differs from Case v. Dewey, 55 Mich. 116, 20 N. W. 817, and 21 N. W. 911. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him. Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter

and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff. I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 321; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants' & Manufacturers' Bank, 35 Mich. 527; Carpenter v. Graham, 42 Mich. 191, 3 N. W. 971; Brewer v. Salt Ass'n, 47 Mich. 534, 11 N. W. 370; Whitcomb v. Whitney, 24 Mich. 486; Byles v. Collier, 51 Mich. 1, 19 N. W. 565; Scotten v. Sutter, 37 Mich. 527, 532; Ducey Lumber Co. v. Lane, 58 Mich. 520, 525, 25 N. W. 568; Jenkinson v. Monroe, 61 Mich. 451, 28 N. W. 663.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, —such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales, (4th Ed.) §§ 377, 148. See, also, Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492, 12 Allen, 44; Huthmacher v. Harris' Adm'rs, 38 Pa. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 63–71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750;

if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

CAMPBELL, C. J., and CHAMPLIN, J., concurred.

SHERWOOD, J., delivered a dissenting opinion.

REDPATH et al. v. BROWN et al.

(39 N. W. 51, 71 Mich. 258.)

Supreme Court of Michigan. July 11, 1888.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Replevin brought by Ellis W. Redpath, Leonidas H. Redpath, and Newton H. Redpath against William Brown and Catherine M. Jones, to recover possession of certain merchandise, boots and shoes, sold by plaintiffs to the firm of Jones Bros. between August 31, 1886, and November 5, 1886. The case in the court below, upon the part of the plaintiffs, was prosecuted upon the theory that they were entitled to recover on three distinct grounds: First, that they had been induced to sell the goods in question to Jones Bros. by reason of false representations made by Jones Bros. with reference to their financial responsibility to commercial agencies, which representations had been communicated to plaintiffs with a view to enable them to purchase goods from plaintiffs on credit; second, that, at the time that they made the purchases of the goods in question, it was their intention not to pay for the same; third, that the transfer of the possession and title of the goods in question, purchased by Jones Bros., was the consummation of a fraudulent scheme entered into at the time the goods were purchased, and effected by means of the assignment made to defendant Brown, and a chattel mortgage executed to defendant Jones. It appears that prior to March 31, 1886, the firm of Jones Bros. referred to were conducting a small business on Jefferson avenue, in the city of Detroit, and about that time decided to enlarge their business, and remove to a more commodious store on Michigan avenue. With such object and purpose in view, one of the firm visited Boston for the purpose of purchasing goods upon credit; and while there made one of the statements relied upon in this case to John W. Haight, an employé of the American Boot & Shoe Reporting Company, as a basis for credit they intended to ask of the subscribers to such agency. The statement is, in substance, as follows: Capital in business, $3,200; total indebtedness, less than $100; rent, $840; sales for the year 1885, $5,100; moved to this store March, 1886; when spring goods are in, which we have bought, will make our stock about $5,000; and our indebtedness, $1,800. Do their own work. Means all in the business. This firm continued to do business until January 19, 1887, when they made an assignment for the benefit of their creditors to defendant Brown. Previous to the execution of this assignment, the firm executed to defendant Catherine M. Jones, who is their sister, a chattel mortgage for $2,000 covering their entire stock of boots and shoes. This chattel mortgage purports to have been executed January 6, 1887, but was not filed with the city clerk of the city of Detroit until January 19, 1887, the same day the assignment was executed. Credits for the goods sold were granted on the strength of such statement, and one made February 4, 1884, to the National Shoe & Leather Exchange, which is, in substance, as follows: Capital, January 1, 1884, $2,250; stock insured for $1,500; outstanding accounts, $100; owe for goods, $171.14. Have no borrowed money; no chattel mortgages or judgments. Claim a business was done last year of $5,069; that they are worth $2,200 above all liabilities. It appeared, at the time they executed their assignment, January 19, 1887, that their total assets were as follows: Stock, $5,345; furniture and fixtures, $225; findings, $20; book-accounts, $193.50; while their liabilities aggregated $7,430.63. During the interval between March 31, 1886, and January 19, 1887, the expenses of the firm's business were about $2,056.50; thus showing that there should have been on hand, January 19, 1887, of the original stock of $3,200, $1,200, in addition to all the stock they had acquired in the mean time. But, instead of there being a surplus over liabilities, there was a deficit of $2,000. The firm's books showed that, between the above dates, they had purchased goods to the amount of $13,669.27, and had paid thereon $6,886.41; and they claimed to have borrowed $2,000 of a sister, which they had put into the business. This state of affairs would require them to account for the following:

Stock at time statement was made..		$ 3,200 00
Stock purchased since then.....		13,669 37
Cash borrowed.....		2,000 00
		$18,869 37
Payments as above.....	$6,886 41	
Expenses	2,056 50	
		8,942 91
Which would leave goods on hand		$ 9,926 46

There was evidence also to show that at the time of making the statement, in March, 1886, they owed their sister over $1,000. The chattel mortgage given by the firm to the defendant Catherine M. Jones was executed 13 days before the assignment, but was not filed until the day the assignment was made. It also appeared that, after the assignment, the assignee went into possession, retaining the Jones Bros., and a clerk whom they had employed. No change was made in the signs. The business was finally transferred to Catherine M. Jones; she taking the stock in payment of her chattel mortgage, and paying the balance in cash, Jones Bros. acting as her agent in the transaction. On paying the rent, the assignee had taken a receipt reserving the rights of the Jones Bros. to retain the store under the lease. The assignee in his account stated that he had cash on hand $885.32, but in that account he credited himself with the sum of $1,060.38, paid on the Catherine M. Jones mortgage; but the bill of sale of the stock showed that it was only $1,515.63; and, as she was to pay $2,367.78 for the stock, it left a balance of

$822.15 received from that source. The retail sales amounted to $768.75, making the total cash receipts $1,610.90, while the total expenses were $291.83; showing $1,319.07, instead of $885.32, to be accounted for by the assignee. At the close of the testimony, the court took the case from the jury, and ordered a judgment in money in favor of the defendants jointly. Plaintiffs bring error.

Dickinson, Thurber & Hosmer and Elliott G. Stevenson, for appellants. E. T. Wood, for appellees.

CAMPBELL, J. Plaintiffs sued in replevin to get back certain goods which they claimed had been obtained from them fraudulently by a firm doing business as Jones Bros. These goods were sold at various times, upon the faith of representations of solvency; and plaintiffs claimed the facts showed that the purchasers had obtained the property with a purpose of cheating their creditors. Brown was the assignee of that firm, and Catherine M. Jones had purchased most of the assigned stock, paying for it partly by a chattel mortgage, the good faith of which was attacked, and partly otherwise. The dealings of the defendants were claimed not to entitle them to stand in any better position than their vendors. Upon the trial the court let in proof of a series of representations of business condition which indicated solvency and healthy business, and further testimony claimed to show either that these representations were untrue, or else that goods had been disposed of in some fraudulent way, which it is insisted tended to the direction of a fraudulent scheme to get goods, and make away with them, without paying for them. It is claimed that the assignee's accounts show tampering with the assets, and that the chattel mortgage was not in good faith. After receiving the testimony, the circuit judge ruled that no fraud was made out, and took the case from the jury, and ordered a judgment in money in favor of defendants jointly. We do not see any foundation for such a joint money recovery. Defendants had no joint interest in the property replevied, so far as the record shows. But we think the case should have gone to the jury on the facts. There was pertinent testimony upon the question of fraud. If the transactions involved the perpetration of continuous frauds on plaintiffs, they had a right, as against their vendees, to rescind, and an equal right as against other persons colluding with them to carry out their schemes. If there was any testimony tending appreciably to show fraud, the weight of it was a question of fact for the jury. Defendants introduced no testimony; and, had they done so, it would have required the same treatment. The question before us is not what we might ourselves have inferred from the facts in evidence. We have no means of knowing that these facts would have persuaded the jury that any fraud was committed, or that all the doubts, if any, might not be cleared up. For anything we know, the firm may have given out for want of business capacity and experience. We do not propose to make any comments, or express any suspicions. All that we do is to say that we think the case was a proper one for the jury to consider. It is not necessary, in order to prove fraudulent purchases, to show defendants' complicity in the original scheme, if there was a scheme. They may be unable to hold the goods without being guilty of actual dishonesty. Had they gone into proof, the verdict might have been favorable; but, without testimony on their side, we cannot say that the jury would have found against plaintiffs. The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

POLHILL v. WALTER.

(3 Barn. & Adol. 122.)

Court of King's Bench. Hilary Term, 1832.

Declaration stated, in the first count, that J. B. Fox, at Pernambuco, according to the usage of merchants, drew a bill of exchange, dated the 23d of April, 1829, upon Edward Hancorne, requesting him, sixty days after sight thereof, to pay Messrs. Turner, Brade, and Co., or order, £140. 16s. 8d. value received, for Mr. Robert Lott; that afterwards the defendant, well knowing the premises, did falsely, fraudulently, and deceitfully represent and pretend that he was duly authorized by Hancorne to accept the said bill of exchange according to the usage of merchants, on behalf and by the procuration of Hancorne, to whom the same was directed as aforesaid, and did then and there falsely and fraudulently pretend to accept the same by the procuration of Hancorne; that the said bill of exchange was indorsed over, and by various indorsements came to the plaintiff, of which the defendant had notice; that the plaintiff, relying upon the said pretended acceptance, and believing that the defendant had authority from Hancorne so to accept the bill on his behalf, and in consideration thereof, and of the indorsement, and of the delivery of the bill to him the plaintiff, received and took from the last indorsers the bill as and for payment of the sum of money in the bill specified, for certain goods and merchandizes of the plaintiff sold to the indorsers; that when the bill became due, it was presented to Hancorne for payment, but that he, Hancorne, did not nor would pay the same, whereupon the plaintiff brought an action against Hancorne as the supposed acceptor thereof; and that by reason of the premises, and the said false representation and pretence of the defendant, the plaintiff not only lost the sum of money in the bill of exchange mentioned, which has not yet been paid, but also expended a large sum, to wit, £42. 7s., in unsuccessfully suing Hancorne, and also paid £17 to him as his costs. The second count, after stating the drawing of the bill according to the custom of merchants, by Fox, as in the first count, alleged that the defendant, well knowing the premises, did falsely and deceitfully represent and pretend that he, the defendant, was duly authorized by Hancorne to accept the bill according to the said usage and custom of merchants, on behalf and by the procuration of Hancorne, to whom the same was directed, and did accept the same in writing under pretence of the procuration aforesaid; that by various indorsements the bill came to the plaintiff; that he, the plaintiff, relying on the said pretended procuration and authority of Hancorne, and in consideration thereof, and of the said acceptance, received and took the bill as and for payment of a sum of money in the bill specified, in respect of goods sold by the plaintiff. The count then stated the presentment of the bill to Hancorne and his refusal to pay, and averred that it became and was the duty of the defendant to pay the sum in the bill specified, as the acceptor thereof, but that he had refused. There was a similar allegation of special damage as in the first count. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term, 1831, it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn upon Hancorne was, in June, 1829, left for acceptance at that place, and, afterwards, a banker's clerk, accompanied by a Mr. Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and would not return for a week or ten days, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it per procuration of Mr. Hancorne. After this acceptance, it was indorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him, and, on the defendant appearing and stating the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action, amounting in the whole to £196. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord Tenterden was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff; giving the plaintiff leave to enter a verdict for the sum of £196 if the court should be of opinion that he was entitled thereto. The jury found a verdict for the defendant. In the ensuing Easter term Sir James Scarlett obtained a rule nisi, according to the leave reserved, against which in the last term cause was shown by

Mr. Campbell and F. Kelly. Sir James Scarlett and Mr. Lloyd, contra.

LORD TENTERDEN, C. J., now delivered the judgment of the court.

In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary term, a rule nisi was obtained to enter a verdict for the plaintiff, and cause was shown during the last term. The declaration contained two counts;

The first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant falsely, fraudulently, and deceitfully did represent and pretend that he was duly authorized to accept the bill by the procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several indorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last indorsee in discharge of a debt; that the bill was dishonoured, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretence of the procuration from Hancorne; and then proceeded to describe the indorsements to the plaintiff, and the dishonour of the bill, and alleged, that thereupon it became and was the duty of the defendant to pay the bill as the acceptor thereof, but that he had not done so.

On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent; and that the defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonoured when due, an action was brought against Hancorne; the defendant was called as a witness on the trial of that action, and he negativing any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negatived all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent, making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47,) or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so; and if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with, or warranty to, him.

It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of Foster v. Charles, 6 Bing. 396, 7 Bing. 105, which was twice under the consideration of the court of common pleas, and to which may be added the recent case of Corbet v. Brown, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and, thereby in substance, represented that he had authority from the drawee to make it, knew that he had no such authority, (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

DERRY et al. v. PEEK.

(L. R. 14 App. Cas. 337.)

House of Lords. July 1, 1889.

Appeal from court of appeal.

Action on the case brought by Sir Henry William Peek against William Derry, chairman, and J. C. Wakefield, M. M. Moore, J. Pethwick, and S. J. Wilde, four of the directors of the Plymouth, Devonport & District Tramways Company, for damages for alleged fraudulent misrepresentations of defendants whereby plaintiff was induced to take shares in the company. The company was incorporated in 1882 by special act (45 & 46 Vict. c. 159), which provided, inter alia, that the cars used on the tramways might be moved by animal power, and, with the consent of the board of trade, by steam or any mechanical power, for fixed periods, and subject to the regulation of the board. The tramways act of 1870 (33 & 34 Vict. c. 78) provides that all cars used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. In 1883 the defendants, as directors of the company, issued a prospectus containing the following paragraph: "One great feature of the undertaking, to which considerable importance should be attached, is that, by the special act of parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses; and it is fully expected that, by means of this, a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses." Plaintiff, relying upon the representation of the right of the company to use steam or mechanical power, took shares in the company. Subsequently the board of trade refused to consent to the use of steam or other mechanical power, except on certain portions of the tramways, the result of which was that the company was wound up. Plaintiff brought this action of deceit. At the trial, before Stirling, J., the action was dismissed; but, on appeal to the court of appeal, the decision below was reversed. Defendants appealed from the judgment of the court of appeal.

Sir Horace Davey, Q. C., and Mr. Moulton, Q. C. (M. Muir Mackenzie, with them), for appellants. Mr. Bompas, Q. C., and Mr. Byrne, Q. C. (Mr. Patullo, with them), for respondent.

Lord HERSCHELL. My lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made, in a prospectus issued by them, certain statements which were untrue; that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company. "This action is one which is commonly called an action of 'deceit' a mere common-law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone. It is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this, because observations made by learned judges in actions for rescission have been cited, and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. Burrowes v. Lock, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this, it has been said that the circumstance that the answer was honestly made, in the belief that it was true, affords no defense to the action. Lord Selborne pointed out in Brownlie v. Campbell, L. R. 5 App. Cas. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the court of appeal in the case before your lordships. "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the chancery division or any of the common-law di-

visions; there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in Arkwright v. Newbold, 17 Ch. Div. 301. It was adopted by Lord Blackburn in Smith v. Chadwick, L. R. 9 App. Cas. 193, and is not, I think, open to dispute.

In the court below, Cotton, L. J., said: "What, in my opinion, is a correct statement of the law, is this: that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false,—that is, without any reasonable ground for believing it to be true,—he is liable in an action of deceit, at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned lord justice speaks of a statement made recklessly, or without care whether it is true or false,—that is, without any reasonable ground for believing it to be true,—I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true; and it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. That the learned lord justice thought that, if a false statement were made without reasonable ground for believing it to be true, an action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated among persons in order to induce them to take shares, "there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others." The learned judge proceeds to say: "Although, in my opinion, it is not necessary that there should be what I should call fraud, yet in these actions, according to my view of the law, there must be a departure from duty; that is to say, an untrue statement made, without any reasonable ground for believing that statement to be true; and, in my opinion, when a man makes an untrue statement, with an intention that it shall be acted upon, without any reasonable ground for believing that statement to be true, he makes a default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them."

Now, I have first to remark on these observations that the alleged "right" must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For, if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant. I think it must have been intended to make the statement of the right correspond with that of the alleged duty, the departure from which is said to be making an untrue statement without any reasonable ground for believing it to be true. I have further to observe that the lord justice distinctly says that, if there be such a departure from duty, an action of deceit can be maintained, though there be not what he should call fraud. I shall have by and by to consider the discussions which have arisen as to the difference between the popular understanding of the word "fraud" and the interpretation given to it by lawyers, which have led to the use of such expressions as "legal fraud," or "fraud in law;" but I may state at once that, in my opinion, without proof of fraud no action of deceit is maintainable. When I examine the cases which have been decided upon this branch of the law, I shall endeavor to show that there is abundant authority to warrant this proposition.

I return now to the judgments delivered in the court of appeal. Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes, L. J., states what, in his opinion, is the result of the cases. I will not trouble your lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be in fact relied

on by the person to whom it is made, may be sued by the person damaged thereby, "fourthly, if it is untrue in fact, but believed to be true, but without any reasonable ground for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true; but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of Pasley v. Freeman, 2 Smith, Lead. Cas. 94. If it was not there for the first time held that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was, at all events, not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in Baily v. Merrell, 3 Bulst. 95, who said: "Fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur * * * an action lies." In reviewing the case of Crosse v. Gardner, Carth. 90, he says: "Knowledge of the falsehood of the thing asserted is fraud and deceit;" and, further, after pointing out that in Risney v. Selby, 1 Salk. 211, the judgment proceeded wholly on the ground that the defendant knew what he asserted to be false, he adds: "The assertion alone will not maintain the action, but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so;" the latter words being specially emphasized. Kenyon, C. J., said: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation stated on the record, by which they sustained damage. Can a doubt be entertained for a moment but that is injurious to the plaintiffs?" In this case it was evidently considered that fraud was the basis of the action, and that such fraud might consist in making a statement known to be false. Haycraft v. Creasy, 2 East, 92, was again an action in respect of a false affirmation made by the defendant to the plaintiff about the credit of a third party whom the plaintiff was about to trust. The words complained of were: "I can assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." All the judges were agreed that fraud was of the essence of the action, but they differed in their view of the conclusion to be drawn from the facts. Lord Kenyon thought that fraud had been proved, because the defendant stated that to be true within his own knowledge which he did not know to be true. The other judges, thinking that the defendant's words vouching his own knowledge were no more than a strong expression of opinion, inasmuch as a statement concerning the credit of another can be no more than a matter of opinion, and that he did believe the lady's credit to be what he represented, held that the action would not lie. It is beside the present purpose to inquire which view of the facts was the more sound. Upon the law there was no difference of opinion. It is a distinct decision that knowledge of the falsity of the affirmation made is essential to the maintenance of the action, and that belief in its truth affords a defense.

I may pass now to Foster v. Charles, 7 Bing. 105. It was there contended that the defendant was not liable, even though the representation he made was false to his knowledge, because he had no intention of defrauding or injuring the plaintiff. This contention was not upheld by the court, Tindal, C. J., saying: "It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad." This is the first of the cases in which I have met with the expression "fraud in law." It was manifestly used in relation to the argument that the defendant was not actuated by a desire to defraud or injure the person to whom the representation was made. The popular use of the word "fraud" perhaps involves generally the conception of such a motive as one of its elements. But I do not think the chief justice intended to indicate any doubt that the act which he characterized as a fraud in law was in truth fraudulent as a matter of fact also. Willfully to tell a falsehood, intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent, whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made.

Foster v. Charles, 7 Bing. 105, was followed in Corbett v. Brown, 8 Bing. 33, and shortly afterwards in Polhill v. Walter, 3 Barn. & Adol. 114. The learned counsel for the respondent placed great reliance on this case, because, although the jury had negatived the existence of fraud in fact, the defendant was nevertheless held liable. It is plain, however, that all that was meant by this finding of the jury was that the defendant was not actuated by any corrupt or improper motive, for Lord Tenterden says: "It was contended that, * * * in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which from the mode in which it is made is calculated, to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A willful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud, and for this position was cited Foster v. Charles, 7 Bing. 105, to which may be added the recent case of Corbett v. Brown, 8 Bing. 33. The principle of these cases appears to be well founded, and to apply to the present."

In a later case of Crawshay v. Thompson, 4 Man. & G. 357, Maule, J., explains Polhill v. Walter, 3 Barn. & Adol. 114, thus: "If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure. That is the effect of Polhill v. Walter." In the same case, Cresswell, J., defines "fraud in law" in terms which have been often quoted. "The cases," he says, "may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact to the injury of another."

In Moens v. Heyworth, 10 Mees. & W. 157, which was decided in the same year as Crawshay v. Thompson, 4 Man. & G. 357, Lord Abinger having suggested that an action of fraud might be maintained where no moral blame was to be imputed, Parke, B., said: "To support that count [viz., a count for fraudulent representation] it was essential to prove that the defendants, knowingly, [and I observe that this word is emphasized,] by words or acts, made such a representation as is stated in the third count, relative to the invoice of these goods, as they knew to be untrue."

The next case in the series (Taylor v. Ashton, 11 Mees. & W. 401) is one which strikes me as being of great importance. It was an action brought against directors of a bank for fraudulent representations as to its affairs, whereby the plaintiff was induced to take shares. The jury found the defendants not guilty of fraud, but expressed the opinion that they had been guilty of gross negligence. Exception was taken to the mode in which the case was left to the jury, and it was contended that their verdict was sufficient to render the defendants liable. Parke, B., however, in delivering the opinion of the court, said: "It is insisted that even that [viz., the gross negligence which the jury had found], accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless it be fraudulently made. * * * But then it was said that, in order to constitute that fraud, it was not necessary to show that the defendants knew the fact they stated to be untrue; that it was enough that the fact was untrue, if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to show that the defendants knew the facts to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud."

Now, it is impossible to conceive a more emphatic declaration than this: that, to support an action of deceit, fraud must be proved, and that nothing less than fraud will do. I can find no trace of the idea that it would suffice if it were shown that the defendants had not reasonable grounds for believing the statements they made. It is difficult to understand how the defendants could, in the case on which I am commenting, have been guilty of gross negligence in making the statements they did, if they had reasonable grounds for believing them to be true, or if they had taken care that they had reasonable grounds for making them.

All the cases I have hitherto referred to were in courts of first instance. But in Evans v. Collins, 5 Q. B. 804, 820, they were reviewed by the exchequer chamber. The judgment of the court was delivered by Tindal, C. J. After stating the question at issue to be "whether a statement or representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly, and in the full belief that it was true, affords a ground of action," he proceeds to say: "The current of the authorities, from Pasley v. Freeman, 2 Smith, Lead. Cas. 94, downwards, has laid down the general rule of law to be that fraud must concur with the false statement in order to give a ground of action." Is it not clear that the court considered that fraud was absent if the statement was "made honestly, and in the full belief that it was true?"

In Evans v. Edmonds, 13 C. B. 777, Maule, J., expressed an important opinion, often

quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." The foundation of this proposition manifestly is that a person making any statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes, it to be true; and, if he has no such belief, he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true.

I now arrive at the earliest case in which I find the suggestion that an untrue statement, made without reasonable ground for believing it, will support an action for deceit. In Bank v. Addie, L. R. 1 H. L. Sc. 145, 162, the lord president told the jury "that, if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be a misrepresentation and deceit." Exceptions having been taken to this direction without avail in the court of sessions, Lord Chelmsford, in this house, said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a bona fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned lord intended to go further, as apparently he did, and to say that, though the belief was really entertained, yet, if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act; but he is not, in my opinion, "fraudulent" in the sense in which that word was used in all the cases from Pasley v. Freeman, 2 Smith, Lead. Cas. 94, down to that with which I am now dealing. Even when the expression "fraud in law" has been employed, there has always been present, and regarded as an essential element, that the deception was willful, either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing. I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his lordship [the lord president] thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true." Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference, I do not think it was intended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank.

When this is borne in mind, and the words which follow those quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words, "the opinion which they had formed," as meaning anything different from "the belief which they entertained." The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think that they bear any such construction. In the case of Mining Co. v. Smith, L. R. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious, when making the assertion, that they were ignorant whether it was true or untrue; for, if not, it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently. He must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than an adoption of the opinion expressed by Maule, J., in Evans v. Edmonds, 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure. In Peek v. Gurney, L. R. 6 H. L. 377, 403, the same learned lord, after alluding to the circumstance that the defendants had been acquitted of fraud upon the criminal charge, and that there was a great deal to show that they were laboring under the impression that the concern had in it the elements of a profitable commercial undertaking, proceeds to say: "They may be absolved from any charge of a willful design or motive to mislead or defraud the public. But, in a civil proceeding of this kind, all that your lordships have to examine is the question, was there or was there not misrepresentation in point of fact? If there was, however, however innocent the motive may have been, your lordships will be obliged to arrive at the consequences which properly would result from what was done." In the case then under consideration it was clear that, if there had been a false statement of fact, it had been knowingly made. Lord Cairns certainly could not have meant that in an action of deceit the only question to be considered was whether or not there was misrepresentation in point of fact. All that he there pointed out was that in such a case motive was immaterial; that it mattered not that there was no design to mislead or defraud the public if a false representation were knowingly made. It was therefore but an affirmation of the law laid down in Foster v. Charles, 7 Bing. 105, Polhill v. Walter, 3 Barn. & Adol. 114, and other cases I have already referred to.

I come now to very recent cases. In Weir v. Bell, 3 Exch. Div. 238, Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times, at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

In the same case Cotton, L. J., stated the law in much the same way as he did in the present case, treating "recklessly" as equivalent to "without any reasonable ground for believing" the statements made. But the same learned judge, in Arkwright v. Newbold, 17 Ch. Div. 301, laid down the law somewhat differently, for he said: "In an action of deceit the representation to found the action must not be innocent; that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true." And his exposition of the law was substantially the same in Edgington v. Fitzmaurice, 29 Ch. Div. 459. In this latter case Bowen, L. J., defined what the plaintiff must prove in addition to the falsity of the statement, as "secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false."

It only remains to notice the case of Smith v. Chadwick, 20 Ch. Div. 27, 44, 67. The late master of the rolls there said: "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit. He cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not

requisite for Sir George Jessel in Smith v. Chadwick, 20 Ch. Div. 27, 44, 67, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point. The conclusion at which he arrived is expressed in these terms: "On the whole, I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit." I may further note that in the same case Lindley, L. J., said: "The plaintiff has to prove—First, that the misrepresentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the defendants, or, at all events, that they did not believe the truth of it." This appears to be a different statement of the law from that which I have just criticised, and one much more in accord with the prior decisions.

The case of Smith v. Chadwick was carried to your lordships' house. L. R. 9 App. Cas. 187, 190. Lord Selborne thus laid down the law. "I conceive that, in an action of deceit, it is the duty of the plaintiff to establish two things: First, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned lord regards the proof of actual fraud as essential. All the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that, although he nearly agreed with the master of the rolls, the learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of Brownlie v. Campbell, L. R. 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a willful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First. In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly. Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of Pasley v. Freeman, 2 Smith, Lead. Cas. 94, down to Bank v. Addie, L. R. 1 H. L. Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of Weir v. Bell, 3 Exch. Div. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The dictum of the late master of the rolls that a false statement, made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. Indeed, Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of Taylor v. Ashton, 11 Mees. & W. 401, appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the court below. I observe that Sir Frederick Pollock, in his able work on Torts (page 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George

Jessel, M. R., says that the actual decision in Taylor v. Ashton, 11 Mees. & W. 401, is not consistent with the modern cases, on the duty of directors of companies. I think he is right. But, for the reasons I have given, I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters, for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in Brownlie v. Campbell, L. R. 5 App. Cas. 925, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene, and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that, by the special act of parliament which the company had obtained, they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts. Before considering whether the charge of fraud is proved, I may say that I approach the case of all the defendants, except Wilde, with the inclination to scrutinize their conduct with severity. They most improperly received sums of money from the promoters, and this unquestionably lays them open to the suspicion of being ready to put before the public whatever was desired by those who were promoting the undertaking. But I think this must not be unduly pressed, and when I find that the statement impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion. I must further remark that the learned judge who tried the cause, and who tells us that he carefully watched the demeanor of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. An opinion so formed ought not to be differed from except on very clear grounds, and, after carefully considering the evidence, I see no reason to dissent from Stirling, J.'s, conclusion. I shall therefore assume the truth of their testimony.

I agree with the court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but, to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your lordships must consider what were the circumstances. By the general tramways act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special act, and, where no such power is prescribed, by animal power only. 33 & 34 Vict. c. 78, § 34. In order, therefore, to enable the company to use steam-power, an act of parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the board of trade. It was therefore incorrect to say that the company had the right to use steam. They would only have that right if they obtained the consent of the board of trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the board of trade, obtained a special act empowering the use of steam. It might well be that the fact that the consent of the

board of trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the board would be obtained as a matter of course if its requirements were complied with, and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the general tramways act, and I believe in the railways act also, prohibiting the line being opened until it had been inspected by the board of trade, and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn, now, to the evidence of the defendants. I will take first that of Mr. Wilde, whose conduct in relation to the promotion of the company is free from suspicion. He is a member of the bar, and a director of one of the London tramway companies. He states that he was aware that the consent of the board of trade was necessary, but that he thought that such consent had been practically given, inasmuch as, pursuant to the standing orders, the plans had been laid before the board of trade, with the statement that it was intended to use mechanical as well as horse power, and no objection having been raised by the board of trade, and the bill obtained, he took it for granted that no objection would be raised afterwards, provided the works were properly carried out. He considered, therefore, that, practically and substantially, they had the right to use steam, and that the statement was perfectly true. Mr. Pethick's evidence is to much the same effect. He thought the board of trade had no more right to refuse their consent than they would in the case of a railway; that they might have required additions or alterations; but that, on any reasonable requirements being complied with, they could not refuse their consent. It never entered his thoughts that, after the board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent. Mr. Moore states that he was under the impression that the passage in the prospectus represented the effect of section 35 of the act, inasmuch as he understood that the consent was obtained. He so understood from the statement made at the board by the solicitors to the company, to the general effect that everything was in order for the use of steam, that the act had been obtained subject to the usual restrictions, and that they were starting as a tramway company, with full power to use steam as other companies were doing. Mr. Wakefield, according to his evidence, believed that the statement in the prospectus was fair; he never had a doubt about it. It never occurred to him to say anything about the consent of the board of trade, because, as they had got the act of parliament for steam, he presumed at once that they would get it. Mr. Derry's evidence is somewhat confused, but I think the fair effect of it is that, though he was aware that under the act the consent of the board of trade was necessary, he thought that, the company having obtained their act, the board's consent would follow as a matter of course, and that the question of such consent being necessary never crossed his mind at the time the prospectus was issued. He believed at that time that it was correct to say they had the right to use steam.

As I have said, Stirling, J., gave credit to these witnesses, and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the board of trade would follow as a matter of course, because they had obtained their act. It was absolutely in the discretion of the board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the board of trade was practically concluded by the passing of the act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. It is not unworthy of note that, in his report to the board of trade, Gen. Hutchinson, who was obviously aware of the provisions of the special act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The act of 1882 gives the company authority to use mechanical power over all their system." I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form, —by asking ourselves whether a reasonable man would be likely, under the circumstances, so to believe. I have applied this test. With that I have a strong conviction that a reasonable man, situated as the defendants were, with their knowledge and means of knowledge, might well believe what they

state they did believe, and consider that the presentation made was substantially true. Adopting the language of Jessel, M. R., in Smith v. Chadwick, 20 Ch. Div. 67, I conclude by saying that, on the whole, I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest, and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit." I think the judgment of the court of appeal should be reversed.

Order of the court of appeal reversed; order of Stirling, J., restored; the respondent to pay to the appellants their costs below and in this house; cause remitted to the chancery division.

See discussion of the effect of this case by Sir Frederick Pollock, 5 Law Quart. Rev. 410; also, an article by Sir William R. Anson, 6 Law Quart. Rev. 72.

HUDNUT v. GARDNER.

(26 N. W. 502, 59 Mich. 341.)

Supreme Court of Michigan. Jan. 27, 1886.

Error to Mecosta; Fuller, Judge.

Palmer & Palmer, for appellant. Gleason & Bundy, for defendant.

CHAMPLIN, J. Plaintiff brought an action of trespass on the case against the defendant before a justice of the peace, and recovered $44.05 damages, which he claimed to have sustained by reason of certain false representations made by defendant to the effect that he (defendant) was authorized as agent of Wetzel Bros. to get certain saw-mill machinery repaired at plaintiff's foundry and works for said Wetzel Bros., and upon their credit; that, relying upon such representations, he performed said work, and delivered it according to defendant's instructions, and charged the same to Wetzel Bros. on his books; that in truth defendant was not the agent of Wetzel Bros., and had no authority whatever from them to contract with plaintiff, and the representations so made by him with reference thereto were false and fraudulent, and were made with intent to deceive, and did deceive, the plaintiff, and deprived him of the material used in making the repairs and the work performed thereon. The plea was the general issue. On the trial in the circuit the parties were sworn, and the plaintiff's testimony proved, if the jury should give it credence, the representations set out in his declaration. The conversation, as he stated it, left no room for doubt or mistake. The defendant testified that he was not the agent of Wetzel Bros. in the transaction, and that he had no authority to make any representations to plaintiff such as testified to by him; and his testimony proved, if the jury should give it credence, that he made no such representations as set out in plaintiff's declaration and testified to by him. The testimony of the plaintiff was corroborated as to a part of the machinery repaired or made by the witness Saltsman, a machinist in Hudnut's employ, who stated that defendant told him that the work was for Wetzel Bros., and he so entered it upon his book, and he produced the book in court. There was no possible way in which the jury could reconcile the testimony of the plaintiff and the defendant, and the issue was narrowed down to the question of credibility. If the jury believed the testimony introduced by the plaintiff, he was entitled to a verdict; if they did not, or if they believed the defendant's, or if the testimony in the minds of the jury was equally balanced, the defendant was entitled to a verdict.

The errors assigned relate exclusively to the charge of the court, and are as follows: The court erred in instructing the jury as follows: " '(1) It is a serious charge, gentlemen, to bring against an individual, but there have been men in the world who have committed just such offenses,—it is an offense really, it is an offense morally, although it is not classed in the category of crimes; but a man who can do that is but one step removed from a criminal.' '(2) These representations, gentlemen, if they were made, and made with the intent to deceive the plaintiff,—with the intent to wrong and defraud him,—it would give him the right to recover whatever damages he might prove.' '(3) Said all that he was claimed to have said, with intent at that time to induce the plaintiff to do something which would be to the plaintiff's injury,—cheat him, or induce him to do something which would result to his loss,—then the plaintiff should recover such damages as the plaintiff may prove he has suffered.' '(4) The court will further instruct you that, while viewing the testimony in this case from one standpoint, you might come to a conclusion that the plaintiff's case is fully substantiated,—fully maintained,—at the same time, if you are able from the testimony to find a full explanation of all the circumstances by which this defendant would be relieved from any charge of fraud,—any intent to deceive,—you have the right to do so.' '(5) If you should find that this plaintiff, by mistake, had charged this labor to the wrong party, unless he was caused to do it by the intentional deceit which was practiced upon him by the defendant, then the defendant is not to blame for it.' '(6) I will state to you further, on this question of intent: If the party represented to the plaintiff anything which was untrue, and it caused the plaintiff, if he used reasonable care, to act upon such suggestions, the defendant at the time knowing what he said was untrue, then you would have the right to presume, and, in fact, you could find, that there was an intent to defraud the plaintiff.' "

The remarks of the court upon which the first assignment of error is based were made immediately after stating to the jury what the plaintiff claimed, and, while we see nothing in the case calling for such remarks, we do not see that it was calculated to or did prejudice the plaintiff's case. Had the verdict been against the defendant, we think he might well have complained that it tended to prejudice the jury against him.

The error in that portion of the instruction which is alleged in the second assignment of error arises under the testimony in the case. The question was, were representations made? If they were made, they were false beyond dispute, and the intent to deceive is conclusively presumed from defendant's knowledge of their falsity. And the jury should have been instructed that if they found that the representations were made, the undisputed evidence being that they were knowingly false if made, the intent to deceive was proven, and the plaintiff would be entitled to recover. The defendant himself testified that he was not the agent of Wetzel Bros., and had no directions from them to have the work done for them, or to have it charged to them, so that

If he did make the representations claimed by plaintiff, he not only made them falsely, but knowing them to be false.

In this connection, we may notice the sixth assignment of error. The vice of this portion of the instruction is that the judge required the jury to find that the plaintiff used reasonable care in acting upon defendant's representations. There was no testimony in the case to which this portion of the charge could be applied. It introduced an unnecessary and uncertain element in the case, which the jury were required to pass upon without directing them as to what would constitute reasonable care or negligence on the part of the plaintiff, under the evidence. And, further, the judge should have instructed the jury that if the defendant represented to the plaintiff anything which was untrue, and the plaintiff acted in reliance thereon, the defendant at the time knowing what he said was untrue, they would have the right to presume, and should find, that there was an intent to defraud the plaintiff.

The fourth and fifth allegations of error may be considered together. We think the instructions embraced therein are erroneous. Under the testimony of the plaintiff there was no room for a mistake, and it was error for the court to advance a theory in conflict with all the evidence in the case. And the testimony of the defendant did not tend to prove in any particular that a mistake had been made, or that a misunderstanding could have arisen from what was said at the time.

The judgment must be reversed, and a new trial ordered.

The other justices concurred.

HULL v. HULL.

(48 Conn. 250.)

Supreme Court of Connecticut. June Term, 1880.

W. K. Townsend and J. H. Whiting, in support of the motions. H. B. Munson, contra.

LOOMIS, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm, in this state, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff. No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm, on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin. The sole ground upon which the defendant claims to hold these colts is that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error. The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist, nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this state and elsewhere abundantly supply it. Lucas v. Birdsey, 41 Conn. 357; Capron v. Porter, 43 Conn. 389; Spring v. Chipman, 6 Vt. 662. In Bellows v. Wells, 36 Vt. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff. In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, partus sequitur ventrem, applies. We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear. It is true, as remarked in Perkins, Conv. tit. "Grant," § 65, that "it is a common learning in the law that a man cannot grant or charge that which he has not"; yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property or interest, may be the subject of a valid present sale. The distinction is illustrated in Hobart, 132, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void." It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Pars. Cont. (5th Ed.) p. 523, note k, and cases there cited; Hill. Sales, § 18; Story, Sales, § 186. In Fonville v. Casey, 1 Murph. (N. C.) 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in McCarty v. Blevins, 5 Yerg. 195, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

Before resting the discussion as to the plaintiff's title, we ought perhaps briefly to allude to a claim made by the defendant, both in the court below and in this court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary the estoppel is asserted in the face of the explicit finding, that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her." The only fact which is suggested as furnishing the basis for the

alleged estoppel is that from the 1st of August, 1879, to the 12th of January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was living during the time at Guilford, where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the statute of limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking or withholding of her property. And can a tort feasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his wrongful possession proved a very expensive one to him, amounting even to more than the value of the property? He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

The single question of evidence which the record presents we do not deem it necessary particularly to discuss. It will suffice to remark that if the defendant's testimony was admissible to show that Murray, after the sale to the plaintiff (and, so far as appears, in her absence), claimed to own the mares and colts, it was a complete and satisfactory reply for the plaintiff in rebuttal to show that Murray's own entries (presumably a part of the res gestæ) in the appropriate books kept by him, showed the fact to be otherwise, and in accordance with the plaintiff's claims. At any rate it is very clear that no injustice was done by this ruling to furnish any ground for a new trial. There was no error in the judgment complained of, and a new trial is not advised. In this opinion the other judges concurred.

HOLROYD v. MARSHALL.

(10 H. L. Cas. 191.)

House of Lords. Aug. 4, 1862.

James Taylor carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for £5,000. And indenture, dated the 20th of September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for £5,000, but could not then pay the purchase money, wherefore it was agreed, &c., that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises')" were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of £5,000, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of £5,000, contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, &c., will at all times, during such continuance as aforesaid, at the request, &c., of the said Holroyds, their executors, &c., do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the £5,000 and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of scire facias against Taylor for the sum of £155. 18s. 4d., damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for £138. 3s. 3d., was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice Chancellor Stuart, who on the 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the vice chancellor's order was reversed. This present appeal was then brought.

Mr. Malins and G. V. Yool, for appellants. Mr. Amphlett and Mr. Hobhouse, for respondents.

Lord Chancellor WESTBURY, after stating the facts of the case, said:

My lords, the question is whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree

specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interests in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case: it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

Some use was made at the bar and in the court below of the language attributed to Mr. Baron Parke in the case of Mogg v. Baker, 3 Mees. & W. 198. That learned judge appears to have given, not his own opinion, but what he understood would have been the decision of a court of equity upon the case. He is represented as speaking upon the authority of one of the judges of the court of chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Mr. Baron Parke, speaking of the agreement in the case, says, "It would cover no specific furniture, and would confer no right in equity." I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in Mogg v. Baker

related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in Mogg v. Baker is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

Lord WENSLEYDALE. My lords, more than a year ago, when this case was argued at your lordships' bar with very great ability on both sides, on behalf of the appellants by Mr. Malins and Mr. Yool, and on behalf of the respondents by Mr. Amphlett and Mr. Hobhouse, the late lord chancellor, with that extraordinary industry which he possessed, immediately after the argument committed his opinion to paper, and I was favoured with a perusal of that opinion, which I read with great attention. My noble and learned friend opposite (Lord CHELMSFORD) also committed his opinion to paper, and he favoured me with its perusal. Upon considering those opinions and the argument I had heard at the bar, my opinion then concurred with that of the late lord chancellor. But now that the matter has been argued a second time, and I have heard the opinion of the lord chancellor upon it, and find that the opinion of my noble and learned friend opposite is the same as it was before, I cannot say that I feel myself so confident in the arguments that have presented themselves to my mind as to press your lordships to adopt them.

I have heard the very able and very clear opinion which the lord chancellor has pronounced, and I cannot help saying, that I think that the views which I adopted upon the subject after the first argument were not correct. I feel, therefore, that I must acquiesce in the judgment proposed.

Lord CHELMSFORD. My lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this house, but that he was supported in it by my noble and learned friend, Lord WENSLEYDALE, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned lord upon the wool sack, before whom the last argument took place. His great learning and long experience in courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

The title of the appellants depends upon a deed dated the 20th September, 1858. [His lordship here stated the bill of sale and the other facts of the case.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be

decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void. Robinson v. Macdonnell, 5 Maule & S. 228. But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the novus actus interveniens of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient declaratio precedens in the words of the maxim; and although Chief Justice Tindal, in the case of Lunn v. Thornton, 1 C. B. 379, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of Congreve v. Evetts, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in Hope v. Hayley, 5 El. & Bl. 830, 845 (a case much relied upon by the vice chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in Mogg v. Baker, 3 Mees. & W. 195, 198, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon in the case of The Warre, 8 Price, 269, n. in support of it. It must also be observed, that the proposition in Mogg v. Baker hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substi-

tuted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell, resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest made subsequently bona fide acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law, property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of Langton v. Horton, 1 Hare, 549, which was relied upon by the respondents as a conclusive authority in their favour. I need not say that I examine every judgment of that able and careful judge Vice Chancellor Wigram with the deference due to such a highly respected authority. Langton v. Horton was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The vice chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of fi. fa., his honour, assuming that the equitable title which was good against the assignor would not, under the circumstances of the case, be available against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the vice chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord Cottenham in the case of Whitworth v. Gaugain, 1 Phil. Ch. 728. It will be necessary, therefore, to direct attention for a short time to that case, and especially as it has an immediate bearing upon the present occasion. The case, as originally presented before Lord Cottenham, was an appeal from an order of the vice chancellor of England appointing a receiver. The bill of the equitable mortgagees was founded entirely upon alleged fraud and collusion between the mortgagor and the tenants by elegit. The defendants had denied fraud and collusion, and also notice of the mortgagee's title at the time of obtaining possession under the elegits. The plaintiffs, in argument, attempted to set up a case not made by their bill, viz. that independently of the question of fraud, they had by law a preferable title to the defendants. The lord chancellor discharged the order for a receiver solely on the ground that the plaintiffs had failed in making out the case on which they asked for the interference of the court. Upon discharging the order, Lord Cottenham is reported to have said that in the argument a totally different turn was given, or attempted to be given, to the plaintiffs' case; viz. that, independently of the question of fraud, they had by law a preferable title to the defendants.' "If," he added, "the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which under the authority of an act of parliament they had a right to hold, the elegit being the creature of the act of parliament, and, therefore, they have a parliamentary title to hold the land as against all persons, unless an equitable case can be made out to induce this court to interfere," Although Vice Chancellor Wigram, in Langton v. Horton, 1 Hare, 549, in adverting to this language, said that he thought Lord Cottenham intended only what his words literally expressed, that he would not interfere against the judgment creditor by an interlocutory order unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect, yet it is impossible to doubt (to use the expression of his honour) "that the strong leaning of Lord

Cottenham's mind" was in favour of the legal right of the judgment creditor over the equitable title of the mortgagees.

This opinion, though merely expressed incidentally, would be entitled to the greatest weight upon the present question, if the law had not been since settled in opposition to it. For in consequence of the ground upon which Lord Cottenham discharged the order for a receiver, the plaintiffs amended their bill, and inserted a prayer for alternative relief, independent of fraud and collusion; and the cause having been brought on for hearing before Vice Chancellor Wigram, his honour decided that the mortgagees were entitled in equity to enforce their charge in priority to the judgment creditors of the mortgagor, although they had no notice of the equitable mortgage, and had obtained actual possession of the land by writ of elegit and attornment of the tenants.

This decision was afterwards affirmed by Lord Lyndhurst, who in the course of his judgment mentioned the case of Abbott v. Stratten, 3 Jones & L. 603; where Sir Edward Sugden, then lord chancellor of Ireland, had determined that an equitable mortgagee was entitled to priority over a subsequent creditor by judgment, who was in possession by a receiver, and who had no notice of the mortgage; and referring to Whitworth v. Gaugain expressed his agreement with the conclusion to which Vice Chancellor Wigram (3 Hare, 416) had come in that case, and stated that "he had repeatedly acted on the rule that an agreement binding property for valuable consideration, though equitable only, will take precedence of a subsequent judgment, whatever may be the consideration for it, and whether it be obtained in invitum or by confession."

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord St. Leonards, "any agreement binding property for valuable consideration" will confer a similar right.

It does not appear from this review of the case of Whitworth v. Gaugain that it could have had any influence over the question in Langton v. Horton, as to the imperfection of the mortgagee's title, unless something had been done to perfect it. The point does not appear to have been at all noticed by Lord Cottenham, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. Langton v. Horton must therefore be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the vice chancellor said, "impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken; and on the arrival of the ship at the port of London the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. Langton v. Horton may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress upon this case to urge it as an authority that an equitable title would have been defective if certain circumstances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, was not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose? The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what novus actus he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a rea-

sonable view of the rights acquired under the deed to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient novus actus interveniens, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

Lord WENSLEYDALE. My noble and learned friend will forgive me, but that was not mentioned in the bill.

Lord CHELMSFORD. My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient actus. But still I am stating what my views are of the whole case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient novus actus interveniens, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary. No possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagee's right, appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of Metcalfe v. Archbishop of York, 1 Mylne & C. 547, 555, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favour of the judgment creditor. If Lord Cottenham really meant to say that notice, by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict. c. 36. It was argued that this act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the legislature, but there is no ground for excluding them from the provisions of the act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late lord chancellor was right in holding that, if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the vice chancellor affirmed.

Mr. Malins asked the direction of the house as to costs. The vice chancellor gave the costs of the sheriff below. Your lordships have given the respondents the costs of the petition of appeal to the court below. I understand your lordships to confirm the decree of the vice chancellor. That would include the costs of the sheriff as well as the costs of the respondents.

THE LORD CHANCELLOR. There can be no costs of this appeal. The petition of rehearing to the court below is dismissed with costs; therefore all persons affected by that petition of rehearing will get their costs below.

The following order was afterwards entered on the journals: "That the decree or decretal order of the court of chancery of the 22d of December, 1860, be reversed; and that the petition for rehearing, presented by the said respondent, Emil Preller, to the lord high chancellor, be dismissed, with costs; and that the cause be remitted back to the court of chancery, to do therein as shall be just, and consistent with this judgment." Lords' Journals, 4th August, 1862.

McCONNELL v. HUGHES.

(29 Wis. 537.)

Supreme Court of Wisconsin. Jan. Term, 1872.

Appeal from circuit court, Green Lake county.

Ryan & Kimball, for appellant. A. B. Hamilton and Butler & Winkler, for respondent.

LYON, J. The bill of exceptions does not purport to contain all of the evidence.

We cannot, therefore, review the evidence, but must presume that it sustains the findings of fact by the circuit court. That court having found that the material allegations of the complaint were proved, it follows that if the complaint states a valid cause of action, the plaintiff was entitled to judgment.

We think that the complaint does state a valid cause of action. It avers that an executory contract for the sale and purchase of wheat was made by the parties, and that, in pursuance thereof, the plaintiff delivered to the defendants, and the defendants accepted and received the wheat. It must be true that by such delivery and acceptance the title to the wheat became vested in the defendants, and the right to have the price therefor, when the same should be determined as provided in the contract, in like manner became vested in the plaintiff.

But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

The contract furnishes a criterion for ascertaining the price of wheat; leaving nothing in relation thereto for further negotiation between the parties. This is all that the law requires. Story, Sales, § 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.

It is further argued that, after a valid sale and before payment of the price, there must be a debt owing by the vendee to the vendor, while in this case, until the price of the wheat was ascertained, there was no indebtedness. The latter part of this proposition is erroneous. As soon as the wheat was delivered, the defendants owed the plaintiff therefor. There was therefore a debt, but the amount thereof was not ascertained. It remained unliquidated until the price of the wheat was determined.

The objections that the assessor could not list the claim for the price of the wheat for taxation, and that the same could not be reached by garnishee process at the suit of a creditor of the plaintiff, while such price remained undetermined, present no practical difficulties. The assessor would fix the value of the demand according to his best judgment as in other cases of the valuation of property and credits; and the creditor in the garnishee proceeding would probably be subrogated to the rights of the plaintiff in respect to determining the contract price for the wheat.

BY THE COURT. The judgment of the circuit court is affirmed.

LYON et al. v. CULBERTSON et al.

(83 Ill. 33.)

Supreme Court of Illinois. Sept. Term, 1876.

Appeal from superior court, Cook county.

Leonard Sweet and John J. Herrick, for appellants. Dent & Black, for appellees.

WALKER, J. We learn from this record that appellees, as partners in the firm of Culbertson, Blair & Co., brought suit against appellants, also partners, doing business under the name of J. B. Lyon & Co., to recover damages for an alleged failure to perform contracts for the purchase of a quantity of wheat. There were several contracts, alike in their terms, except as to amounts and dates, and they were signed by different persons. This is a copy of one of them:

"Chicago, August 14, 1872. We have this day bought of Culbertson, Blair & Co. 10,000 bushels of No. 2 spring wheat, in store, at $1.57½ per bushel, to be delivered, at sellers' option, during August, 1872. This contract is subject, in all respects, to the rules and regulations of the board of trade of the city of Chicago. J. B. Lyon & Co. C."

The rules and regulations referred to are embraced in—

"Rule IX. Margins on Time Contracts.

"Section 1. On all time contracts, made between members of the association, deposits for security and margin may be demanded by either or both parties; said margin not to exceed ten (10) per cent. on the value of the property bought or sold on the day it is demanded. All such deposits to be made with the treasurer of the association, unless otherwise agreed upon by the parties. Said deposits and margins may be demanded on and after the date of contract, and from time to time, as may be necessary to fully protect the party calling for the same. When margins are demanded, the party called upon shall be entitled to deduct from the margin called any difference there may be in his favor between the market price and the contract price of the property bought or sold. Any deposit made to equalize the contract price with the market price shall be considered as a deposit for security, and not margin.

"Sec. 2. Should the party called upon, as herein provided for, fail to respond within the next banking hour, it shall thereafter be optional with the party making such call, by giving notice to the delinquent, to consider the contract filled at the market value of the article at the time of giving such notice; and all differences between said market value and the contract price shall be settled the same as though the time of said contract had fully expired: provided, however, that, when the call is made during the general meeting of the board between 11 a. m. and 1 p. m., the deposit shall be made before 2 o'clock of the same day."

Under these contracts, deposits and margins were put up by the parties in conformity to the rules, from time to time. On the 19th day of August, 1872, the market for No. 2 spring wheat opened at from $1.55 to $1.57, and declined during the day, closing, after exchange hours, at from $1.44 to as low as $1.38. On the 20th the market opened at from $1.27 to $1.34, and fell rapidly during business hours. Between 11 and 1 o'clock, it was as low as $1.10 to $1.11 per bushel. It is claimed that on the morning of the 20th appellees became entitled to further deposits, and thereupon, by written notice sent to the office of the buyers, demand was made of Lyon & Co. for further margins, but, failing to respond to the demand within the next banking hour, Culbertson, Blair & Co. elected, under the rules, to consider the contracts filled, and charged to account of Lyon & Co. the difference between the purchase price and $1.11½, and notified appellants thereof. This difference is the matter in dispute between the parties. On a trial in the court below, the jury found for plaintiffs the difference as claimed. A motion for a new trial was overruled, and judgment rendered on the finding, and this appeal is brought by defendants.

The contract signed by Anderson has been adjusted, and hence it is not necessary to be considered; but the contracts signed by Templeton, as the purchaser, were admitted in evidence, against the objections of appellants. The court excluded evidence offered by appellees to show a usage among the members of the board of trade to demand of the broker the name of his principal at the time of the purchase, and, failing to do so, it was regarded as an election by the seller to look alone to the agent for a fulfillment of the contract. The proper foundation for the introduction of this evidence was laid. Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time would permit, of reducing their agreements to writing beyond a mere memorandum, the courts are compelled to look to the usages of trade or business to learn the real intention of the parties. If proof of such usages was not allowed, it is believed that in a large number, if not the greater portion, of commercial transactions, the intention of the parties would be defeated, instead of being enforced, when differences should occur between them. Where there is a well-known usage which obtains in trade, it must be presumed that all who are engaged in that business, where it prevails, contract with a view to it, unless

they exclude the presumption by their contract. Hence it has been repeatedly held by this court that a usage may be proved to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, not from their express stipulations, but from mere implication and presumptions, and acts of doubtful or equivocal character; but, to have commercial usage take the place of general law, it must be so uniformly acquiesced in for such a length of time that the jury will feel themselves constrained to find that it entered into the minds of the parties, and formed a part of the contract. Dixon v. Dunham, 14 Ill. 324; Crawford v. Clark, 15 Ill. 561; Munn v. Burch, 25 Ill. 35; Fay v. Strawn, 32 Ill. 295; Deshler v. Beers, Id. 368; Insurance Co. v. Favorite, 46 Ill. 263; Turner v. Dawson, 50 Ill. 85. Other cases might be cited in illustration of the rule, were not those referred to amply sufficient for the purpose.

Were it not for the terms and conditions of the contracts as expressed in the rules of the board of trade, the case would be exceedingly simple, and free from all difficulty. We presume all persons in the profession know that when, on the face of these agreements, the delivery of the wheat and the payment of the money were concurrent acts, to be performed by the parties at one and the same time, neither party could put the other in default without performing his part of the agreement, or offering to perform it. Had the time elapsed for performance, all know that appellees would have been compelled to tender the wheat, and appellants to have refused to receive and pay for it, before the former could have sued and recovered. 2 Pars. Cont. p. 189; 1 Chit. Pl. 351. This is illustrated by every well-prepared precedent of a declaration on such contracts, whatever may be the form of action.

But, the parties having incorporated the rules of the board of trade into their agreement, the question arises as to its effect on the contract. It in terms provides that, when either party shall be in default in putting up margins, after notice, and within the next banking hour, the party calling for them shall thereupon have the right to consider the contract filled at the market value at the time of giving such notice, and all differences between such market value and the contract price shall be settled the same as though the time for fulfilling the contract had fully expired. This, in terms, does not require an offer, or an ability or willingness, to perform on either part. It only, in terms, requires a mental operation, unaccompanied with any physical act. Until the expiration of the hour, and for a period of time afterwards, the party claiming a default has, by the terms of the rule, the option to consider the contract filled or not, as he may choose. Had the agreement required the party, before he exercised the option, to have an offer, or at least have shown that he had the ability, to fulfill his part of the agreement, and was willing to do so, then the contract would have conformed to legal principles; but, under the terms of this contract, appellees were not required to have a bushel of grain they could have delivered at the place of performance. It is true, the contract speaks of wheat "in store," but neither wheat nor warehouse receipts were offered, nor was it shown that appellees had any wheat in Chicago, and it could not have been in the contemplation of the parties to deliver or receive it elsewhere, or it would have been so stated in the contract. The use of the words "in store" we understand to mean that it was, at the time of delivery, to be in store in Chicago. The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but, in case of default in keeping margins good, or even at the time for delivery, they only expected to settle the contract on the basis of differences, without either performing or offering to perform his part of the agreement; and, if this was the agreement, it was only gaming on the price of wheat, and, if such gambling transactions shall be permitted, it must eventually lead to what are called "corners," which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain, as well as the producer, and are pernicious, and highly demoralizing to the trade. A contract to be thus settled is no more than a bet on the price of grain during or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is, in all but name, a gambling on the price of the commodity; and the change of names never changes the quality or nature of things. It has never been the policy of the law to encourage, or even sanction, gaming transactions, or such as are injurious to trade, or are immoral in their tendency; and the old maxim that courts will always suppress new and subtile inventions in derogation of the common law (Branch's Principia, 71) would be applicable to such contracts. This seems to be a subtile invention to abrogate well-established, fair, and just principles of the law of contracts, and not only so, but to the great injury of fair and legitimate trade. Here there was surrendered to appellees the deposit of $2,300, and the jury have found a verdict of $5,700, making in all $8,000 for compensation for damages sustained, when, so far as the evidence shows, appellees had no wheat they could have delivered in fulfillment of the contract, nor does it appear that they ever expected to deliver a bushel under this contract. They do not show that they have lost a dime, or that they are liable to lose anything, under this contract. Why, then, say appellees should recover this large sum? All know that it is a fundamental rule that a party cannot recover more than a compensation equal to his loss by any in-

jury he may have sustained, except where punitive damages are given. There is no evidence that appellees had contracted for the wheat necessary to fill this contract, or had incurred the least expense towards its performance. Then why allow them to recover this large sum of money? We know of no principle of justice that requires it more than that of any debt incurred without consideration to support it. It is true that appellees had put up their margins, and if, at the end of the time stipulated, the market had been against them, or if that had been the case before that time, and they had been in default, they would have lost it. The statute has prohibited, under heavy penalties, the sale of wheat on called options to buy or sell grain, because of its pernicious tendency; but it seems to us that these contracts for the sale of grain, where neither party intends to perform them, but simply to cancel them before or at their maturity, and pay differences, are as injurious to trade and fully as immoral as are the sales of options. Neither belongs to fair and legitimate trade.

It is claimed this wheat was again sold to ascertain the differences that should be paid. What wheat? it may be asked. There is no evidence that appellees had any wheat that could be delivered at the place of this contract. So far as we can see, the wheat only existed in imagination; and even this imaginary wheat may have already been sold a number of times before the imaginary fulfillment of the contract, which it is claimed put appellants in default. If the contract was for an actual sale,—a delivery of the grain by warehouse receipts or otherwise,—it would have been necessary to offer to perform, or at least shown a readiness to perform, to have placed appellants in default; and then the difference between the selling price and the contract price would have been the fair measure of damages.

Whilst the law has studiously fostered fair and legitimate trade, it has not sanctioned pernicious practices that are injurious to its votaries, and are demoralizing in their tendencies. Nor can it change the rule that the contract may have been made in good faith, with an honest expectation that the wheat would be delivered, and the money paid therefor, as the law is equally imperative that an offer, or at least a readiness, to perform must be shown by the party seeking to put the other in default. But when they, by the agreement, dispense with a performance, or at least an offer or readiness to perform, then they render the contract obnoxious to the law of contracts. Pickering v. Cease, 79 Ill. 328. It is this effort which stamps it as being in the nature of a gaming contract. It is this effort which characterizes the transaction, and renders it illegal.

We are aware that there are cases which hold that a party may be excused, by the default of the other in the performance of a precedent act, from proving an offer or a readiness to perform on his part, before declaring the contract at an end. Nor is it claimed that, when appellants failed to put up further margins, appellees might not have rescinded the contract by notifying appellants that it was at an end. The contract, on its face, was for the sale and delivery of wheat at a specified price, within a given time; and there was a further agreement contained in the rules of the board of trade that the parties would put up margins, each to secure the other in the performance of the contract. Then, when this latter agreement was not performed by appellants, what resulted as a legal consequence? Why, manifestly, the damage only resulting from a failure to comply with its requirement. It was not for a failure to receive the grain on an offer or a readiness to deliver. And in such a case, what may be recovered? Surely nothing more than the damages sustained by appellees. And what were the damages sustained? The proof shows they were nothing, as appellees had no wheat that could be delivered in fulfillment of the contract. An agreement to perform several acts at different times does not authorize a party to recover for a breach of all because the other party has refused to perform the first in the series. Suppose an owner of a lot of ground were to contract with a builder to furnish all the materials and labor, and construct for him a house on the lot; and suppose the agreement provided that the builder should commence the work at once, and complete the structure within 12 months, and the owner was bound to pay therefor $20,000, in equal monthly installments; and the builder should enter upon the performance of the contract, and expend $1,000 in materials and labor; and the owner should make default in the payment of the first installment. Does any one suppose that the builder could, even if the agreement so provided, treat the contract as filled by him, and sue for and recover the $20,000? We apprehend that no one would contend that he could. Again, suppose there should be added to such an agreement a provision that, if the builder should make default, the owner might treat the contract as fully performed by him, does any one imagine, on the default of the builder, that the owner could sue for and recover of the builder as though he had paid him in advance the $20,000, although he had not paid a dollar on the contract? We presume no one could say it would be legal or just to permit such a recovery. Or suppose in such a contract it should be agreed that the builder should furnish the materials, for which the owner should pay him, and, if the owner should make default, that he should pay for all increase in their value, and suppose that from some sudden and unexpected emergency, building materials should advance 50 per cent., would any one suppose that he could, on the default of the owner, sue him, and recover the rise in

their value,—we will suppose $5,000 or $6,000,—when he did not have on hand any such material, and had contracted for none, nor expended anything therefor? We apprehend that all fair-minded men would say it would be unjust and oppressive in the extreme.

In the cases supposed, such has never been held to be the measure of recovery, and it seems to be obvious that the parties could not contract for such a measure of damages. It would shock the sense of justice of all right-thinking persons, and such a rule would be monstrous. All must concede, in the cases supposed, that a recovery for the labor already performed and money expended, together with such proximate damages as the party not in default had actually sustained, would be the limit of the recovery, because that would be the injury sustained. Then the recovery would not be the sum due on the fulfillment of the contract by either party, but the amount of damages sustained by the breach of the precedent clause of the agreement. In the cases supposed, an action could not be maintained on an averment that the party not in default had fulfilled his part of the contract, although it might have stipulated he might treat it as fulfilled; but, to recover, the action would be on the breach of the precedent clause of the agreement. And this is the extent of the cases which hold that on the breach of a precedent clause of the agreement by one of the parties the other may terminate the contract, and sue for and recover damages, without waiting for the expiration of the time for the fulfillment of the agreement, or offering or showing a readiness to perform his part of the contract. And in such case the party not in default may recover all damages growing out of the breach of the precedent part of the agreement, and not to the same extent that he could had he performed in full his part of the agreement, and the other had not performed his part.

We fail to perceive any difference in principle between the supposed cases and the one at bar. It may be that, had the declaration counted alone for a breach of the agreement to put up margins, and appellees had proved that they had sustained damage by having wheat on hand to deliver, or wheat actually purchased to be delivered on the contract, and on which they had sustained loss, the amount of such loss might have been recovered; but no such loss is shown.

There is another class of cases which hold that the contracting parties may fix a measure of damages which either shall pay who shall make default. But, to be legal, the sum thus agreed to be paid as liquidated damages must be reasonable, and not oppressive. If the sum thus fixed is highly penal, and unjustly oppressive, courts of justice should never enforce the payment of such exorbitant sums. Courts must treat such unjust and oppressive agreements as penalties, and refuse to enforce them. In all penal bonds there is a positive agreement to pay the sum named if the obligor shall fail to perform the annexed condition; and yet all know the penalty cannot be collected, but only the actual damages sustained by the breach of the condition. If the damages proved equal the sum named in the bond, the recovery may be to that extent; but the recovery is for the damages, and not the penalty. In this case the conditions contained in the rules of the board of trade, if to be enforced as claimed, are highly penal, as is illustrated by the recovery below; so much so as not to be enforced.

Another view may be taken of this contract. We have seen that, in case of a failure to put up margins as required, the party demanding them may elect to consider the contract as filled, and the settlement shall then be based on the difference between the contract price and the market price when the default is made. It would by no means be a forced construction to say this contract means that, when the party elects to regard the contract as filled, if he desires to do more than to simply declare the contract at an end—if he desires to hold the other party liable for damages—he must do all things that would have been required of him in case the time for the delivery had elapsed. Had the time for delivery by one party and payment by the other arrived, by the terms of the contract appellees would, it may be held, have been compelled to have tendered the wheat or warehouse receipts before they could have put appellants in default, so as to recover damages for a breach of contract. And the agreement gave the sellers the option to fix the day of delivery, and the right thereupon to demand payment, so it should be within the period limited by the contract. If such was the effect of the terms of this contract, then appellees had the right to, and were required to, offer the grain, whenever they elected to treat the time as having arrived for the fulfillment of the agreement. If they elected, on the 20th of August, to treat the time as having arrived, when they would fill the contract, they should have done so precisely as though the last day had arrived within which they could make a delivery and demand payment. With this construction, appellees were bound to offer the wheat or warehouse receipts therefor; and hence, they having failed to make such an offer, they have failed to show themselves entitled to recover.

We have examined with great care the able and exhaustive argument of appellees' counsel, filed on a petition for a rehearing, but are constrained to adhere to the conclusion heretofore announced, but have modified in some respects the views heretofore expressed. For the reasons herein expressed, the judgment of the court below must be reversed, and the cause remanded. Judgment reversed.

LEE v. GRIFFIN.

(1 Best & S. 272.)

Queen's Bench. May 9, 1861.

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea, that the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the sittings for Middlesex after Michaelmas term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth, and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:—

"My Dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, &c., Frances P."

Shortly after writing the above letter Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the seventeenth section of the statute of frauds (29 Car. II. c. 3), and the learned judge was of that opinion. The plaintiff's counsel then contended that, on the authority of Clay v. Yates, 1 Hurl. & N. 73, the plaintiff could recover in the action on the count for work and labor done, and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

In Hilary term following, a rule nisi having been obtained accordingly,

Patchett now shewed cause. Griffits, in support of the rule, was not called upon to argue.

CROMPTON, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the statute of frauds. The case decided in the house of lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of shewing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but where the contract is for a chattel to be made and delivered it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. Clay v. Yates, 1 Hurl. & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor, or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in Clay v. Yates, 1 Hurl. & N. 73, is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. Atkinson v. Bell, 8 Barn. & C. 277, is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J., in Grafton v. Armitage, 2 C. B. 339, where he says: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff." And Tindal, C. J., in his judgment in the same case, page 340, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the

case of Atkinson v. Bell, 8 Barn. & C. 277, is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the statute of frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted; no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the statute of frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In Atkinson v. Bell, 8 Barn. & C. 277, the contract, if carried out, would have resulted in the sale of a chattel. In Grafton v. Armitage, 2 C. B. 340, Tindal, C. J., lays down this very principle. He draws a distinction between the case of Atkinson v. Bell, 8 Barn. & C. 277, and that before him. The reason he gives is that, in the former case "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter, "there never was any intention to make any thing that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of Clay v. Yates, 1 Hurl. & N. 73, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel. Rule absolute.

COOKE et al. v. MILLARD et al.

(65 N. Y. 352.)

Commission of Appeals of New York. 1875.

Action to recover the price of certain lumber sold and delivered. The referee found that plaintiffs were copartners and wholesale lumber merchants, and proprietors of a planing mill, at Whitehall, N. Y., and defendants were partners and lumber merchants, at New Hamburgh, on the Hudson. The course of business is, that the lumber is shipped from Whitehall by canal to Troy, and thence to New Hamburgh by the Hudson river. On the 5th day of Sept., 1865, the defendants desiring to purchase certain kinds of lumber, were shown by the plaintiffs the lumber then in their yard at Whitehall. This was of the desired quality, but needed to be dressed and cut into the different sizes which they wished. There was much more lumber in the yard shown to the defendants than was requisite for their purposes. The defendants thereupon orally gave to the plaintiffs an order for certain quantities and sizes of lumber, at specified prices, amounting in the whole to $918.22. A memorandum of the order so agreed to was made by the plaintiffs, but was not subscribed by any one. No particular lumber was selected or set apart to fill the order, nor was any part of it then in condition to be accepted or delivered. The defendants told the plaintiffs that Percival, a forwarder at Whitehall, would send a boat to take the lumber, when notified that it was ready to be delivered. Percival, during the same season, and prior to Sept. 5, had taken up a boat for the defendants, and shipped a part of a load of lumber from the plaintiffs' dock, making up the residue from his own yard. He had frequently shipped lumber for the defendants. By the course of trade, a boat could not be obtained to carry a part of a load of lumber from Whitehall to New Hamburgh, except for the price of a full load. To avoid paying such full price, arrangements had to be made to fill out the load. The defendants knew of this when they made the order of Sept. 5. The order only amounted to one-half a boat-load. Percival then had a pile of lumber (seventeen thousand six hundred and seventy-one feet of culls) to ship to the defendants, which was no part of the lumber to be dressed by plaintiffs. The lumber ordered on Sept. 5 was to be taken from the lots examined by the defendants, and the lumber dressed and piled on the plaintiffs' dock, was all taken from the lumber shown. After the oral order defendants went into the lumber yard with the plaintiffs' foreman, Martin, and pointed out to him some of the piles from which they desired the lumber to be manufactured, and directed plaintiffs to put the lumber, when ready, on plaintiffs' dock and to notify Percival; and told plaintiffs that when this was done, Percival, who was also a lumber dealer, would take up a boat and ship the lumber, and make out the load from his yard. Subsequently, the 15th of Sept., the lumber having been prepared and dressed, according to the oral agreement, it was piled upon the dock of the plaintiffs at Whitehall, along the front of the planing-mill, and was, on the 16th of that month, measured by plaintiffs, and was in all respects ready for delivery by them, according to the oral agreement.

The plaintiffs, on the same day, gave notice to Percival that the lumber was ready for delivery, and requested him to send a boat and take it away. Percival had not been notified that he was to ship the lumber, and paid no attention to the notice given him by plaintiffs. On the other hand, the plaintiffs did not ascertain that Percival did not know of the arrangement, which the defendants had told them they would make with Percival as to shipping the lumber, until after the fire hereinafter mentioned. On the next day, Sunday, the lumber being still on the dock, as it was at the time Percival was notified, was consumed by an accidental fire, with the planing-mill and much other property. Judgment for defendants.

Martin W. Cooke, for appellants. Thompson & Weeks, for respondents.

DWIGHT, C. No exceptions were taken in this cause, except to the conclusions of law derived by the referee from the facts as found in the report. There are but two questions to be considered: One is, whether the contract is within the statute of frauds; the other is, if it be held that it is within the statute, were the acts, done by the parties, sufficient to comply with its terms, so as to make the contract enforceable in a court of justice?

In order to determine whether the contract is within the statute, it is important briefly to state the exact acts which the plaintiffs were to perform.

The contract was plainly executory in its nature. There were no specific articles upon which the minds of the buyer and seller met, so that it could be affirmed that a title passed at the time of the contract. The seller was to select from the mass of lumber in his yard, certain portions that would comply with the buyer's order. The purposes of the parties could not even be accomplished by the process of selection. The lumber must be put in a condition to answer the order. It must be dressed and cut into required sizes. The contract called for distinct parcels of surface pine boards, clapboards and matched ceiling. Part of the lumber was surfaced, and a portion of it still in the rough. The clapboards were manufactured from stuff one and a quarter-inch thick. It had to be split, surfaced and rabbeted. The order for the various items was a single one,

there being fifteen thousand four hundred and forty-one feet of the surface pine, ten thousand one hundred and forty-four feet of clapboards, and eight thousand feet of matched ceiling. The surface boards and the ceiling were in existence, and only needed dressing to comply with the order. Whether the clapboards can be deemed to have been in existence may be more doubtful. If a part of the order is within the statute of frauds, and a portion of it without it, the whole transaction must be deemed to be within it, as an entire contract cannot, in this case, be divided or apportioned. Cooke v. Tombs, 2 Anst. 420; Chater v. Beckett, 7 T. R. 201; Mechelen v. Wallace, 7 A. & E. 49; Thomas v. Williams, 10 B. & C. 664; Loomis v. Newhall, 15 Pick. 159. I think it clear that the contract was in its nature entire. It was in evidence that the intention was to buy enough, in connection with what Percival had on hand, to make up a boatload. This could only be accomplished by using the entire amount of the order. Accordingly even if the contract for the clapboards was not a sale, it cannot be separated from the rest of the order, and the cases above cited are applicable.

The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and accordingly not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels or things in action," for the price of $50 or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute "goods, wares and merchandise." It will be assumed however in this discussion, that they are equivalent.

There are at least three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale by him. If on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled. The leading case upon this point is Lee v. Griffin, 1 Best & S. 272; Benj. Sales, 77. The action was there brought by a dentist to recover £21 sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor. The court held this to be the sale of a chattel within the statute of frauds. Blackburn, J., stated the principle of the decision in a clear manner: "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, at the time stipulated for delivery, be regarded as "goods, wares and merchandise," in the sense of being generally marketable commodities made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is rather whether the manufacturer produces the article in the general course of his business or as the result of a special order. Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112. In this very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute." Under this rule it was held in Gardner v. Joy, 9 Mete. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand in Goddard v. Binney, supra, the contract with a carriage manufacturer was that he should make a buggy for the person ordering it, that the color of the lining should be drab, and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be a contract of sale within the statute.

See, also, Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256; Lamb v. Crafts, 12 Metc. 353; Spencer v. Cone, 1 Metc. 283.

The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word "sale." There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. Parsons v. Loucks, 48 N. Y. 17, 19, 8 Am. Rep. 517. The contrast between Parsons v. Loucks, in this state, on the one hand, and Lee v. Griffin, supra, in England, on the other, is that in the former case the word sale refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this state agreeing with Parsons v. Loucks are Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Parker v. Schenck, 28 Barb. 38. These cases are based on certain old decisions in England, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burrows, 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in Parsons v. Loucks. The facts of that case were that a manufacturer agreed to make for the other party to the contract, two tons of book paper. The paper was not in existence, and so far as appears, not even the rags, "except so far as such existence may be argued from the fact that matter is indestructible." So in Sewall v. Fitch, supra, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court accordingly is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in Lee v. Griffin. It is at once so philosophical and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court however in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state, is that when the chattel is in existence, so as not to be governed by Parsons v. Loucks, supra, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will however readily be classified. If, on further discussion, the rule in Lee v. Griffin should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

The view that this case is one of sale is sustained by Smith v. Central R. Co., *43 N. Y. 180, and by Downs v. Ross, 23 Wend. 270.

In the first of these cases there was a contract for the sale and delivery of a quantity of wood, to be cut from trees standing on the plaintiff's land. The court held that it could not be treated as an agreement for work and labor in manufacturing fire-wood out of standing trees. The cases already cited were distinguished in the fact that no change in the thing sold and to be delivered was contemplated, and that the transaction could be regarded as a sale in perfect consistency with the cases which hold that where the substance of the contract consists in the act of converting materials into a new and wholly different article, it is an agreement for work and labor. It was further considered that the case of Towers v. Osborne, 1 Strange, 506, where an agreement for the manufacture of a chariot was a contract for work and labor, was extreme in its nature, and was not to be carried any further. Page 200. The cases of Garbutt v. Watson, 5 B. & Ald. 613, and Smith v. Surman, 9 B. & C. 561, were cited with approval. In Garbutt v. Watson a sale of flour by a miller was held within the statute, although not ground when the bargain was made.

In Downs v. Ross there was a contract for the sale of seven hundred and fifty bushels of wheat, two hundred and fifty of the quantity being in a granary, and the residue unthreshed, but which the vendor agreed to get ready and deliver. The court held the contract to be within the statute of frauds, notwithstanding that the act of threshing was to be done by the vendor. The rule that governed the court was that if the

thing sold exist at the time in solido, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute. Page 272. This proposition is in marked contrast to the view expressed by Cowen, J., in a dissenting opinion. His theory was that where the article which forms the subject of sale is understood by the parties to be defective in any particular which demands the finishing labor of the vendor in order to satisfy the bargain, it is a contract for work and labor and not of sale. The two theories (where the goods exist at the time of sale) have nowhere been more tersely and distinctly stated than in the conflicting opinions of Bronson and Cowen, JJ., in this case. See also Courtright v. Stewart, 19 Barb. 455.

The fallacy in the proposition of Cowen, J., is in assuming that there is any "work and labor" done for the vendee. All the work and labor is done on the vendor's property to put it in a condition to enable him to sell it. His compensation for it is found in the price of the goods sold. It is a juggle of words to call this "a mixed contract of sale and work and labor." When the goods leave the vendor's hands and pass over to the vendee they pass as chattels under an executed contract of sale. While any thing remained to be done the contract was executory. There is abundance of authority for maintaining that a contract in its origin executory may, by the performance of acts under its terms, by one of the parties, become in the end executed. Rohde v. Thwaites, 6 B. & C. 388; Benj. Sales, chap. 5, and cases cited.

The case of Donovan v. Willson, 26 Barb. 138, and Parker v. Schenck, 28 Barb. 38, are to be upheld as falling within the principle of Parsons v. Loucks, supra. Both of these cases concerned articles not in existence, but to be produced by the manufacturer; in the one case beer was to be manufactured, and in the other a brass pump. So in Passale Manuf. Co. v. Hoffman, 3 Daly, 495, the contract was for the manufacture and delivery of fifty warps. None of these were in existence when the order was received. While the case appears to fall within the rule of Parsons v. Loucks, the eminent judge who wrote an elaborate opinion expressing the views of the court would seem to rely upon the Massachusetts rule rather than our own. Whatever view might be entertained of the soundness of that distinction it is now too late to adopt it here, and the case cannot be sustained on that ground.

The only case in our reports appearing to stand in the way of the conclusion arrived at in this cause is Mead v. Case, 33 Barb. 202. The court in that case recognized the distinction herein upheld. The only doubt about the case is whether the court correctly applied the rule to the facts. These were that several pieces of marble put together in the form of a monument were standing in the yard of a marble-cutter. That person agreed with a buyer to polish, letter and finish the article as a monument, and to dispose of it for an entire price—$200. The court held that there was no monument in existence at the time of the bargain. There were pieces of stone in the similitude of a monument, and that was all.

It is unnecessary to quarrel with this case. If unsound, it is only a case of a misapplication of an established rule. If sound, it is a so-called "border case," showing the refinements which are likely to arise in applying to various transactions the rule adopted in Sewall v. Fitch, and kindred cases. It is proper however to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. Then it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, "Si quaeris monumentum, circumspice." It would seem to be enough if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.

In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in Smith v. Central R. Co. They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of Parsons v. Loucks, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In Gilman v. Hill, 36 N. H. 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence, and a sale.

The next inquiry is, whether there have been sufficient acts done on the part of the buyers to comply with the statute. In order to properly solve this question, it is necessary to look more closely into the nature of the contract. As has been already suggested, the contract was in its origin executory. It called for selection on the part of the sellers from a mass of materials. At the time

of the bargain there was no sale. There was at most only an agreement to sell. The plaintiffs however lay much stress on the fact that after the oral bargain and after the defendants had inspected the lumber, they gave directions, also oral, to the plaintiffs to place the lumber after it had been made ready for delivery upon the dock and to give notice to Percival. They urge that the subsequent compliance with these directions by the plaintiffs satisfy the terms of the statute.

It will be observed that all of these directions were given while the contract was still wholly executory, and before any act of selection had been performed by the plaintiffs. It will thus be necessary to consider whether these directions are sufficient to turn the executory contract of sale into an executed one, independent of the statute of frauds, and afterward to inquire whether there was any sufficient evidence of "acceptance and receipt" of the goods to take the case out of the statute. These questions are quite distinct in their nature and governed by different considerations: (1) If the contract had been for goods less than $50 in value, or for more than that amount, and ordered by the defendants in writing, it would still have been executory in its nature, and would have passed no specific goods. It would have been an agreement to sell and not a sale. The case would not have fallen within such authorities as Crofoot v. Bennett, 2 N. Y. 258, and Kimberly v. Patchin, 19 N. Y. 330. Since the goods could not have been identified at all, except by the act of the seller in selecting such as would comply with the order, nor could the purposes of the contract have been performed except by the labor of the plaintiffs in adapting the goods to the defendants' use, the case falls within a rule laid down by Mr. Blackburn in his work on Sales (pages 151, 152): "Where, by the agreement, the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is some times worded, into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." Acraman v. Morrice, 8 C. B. 449; Gillett v. Hill, 2 C. & M. 530; Campbell v. Mersey Docks, 14 C. B. (N. S.) 412.

Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts "of subsequent appropriation." In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. Blackburn, Sales, 128; Benj. Sales, c. 5; Fragano v. Long, 4 B. & C. 219; Rohde v. Thwaites, 6 B. & C. 388; Aldridge v. Johnson, 7 E. & B. 885; Calcutta, etc., Company v. De Mattos, 33 L. J. (Q. B.) 214, in Exch. Cham. This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. Browne v. Hare, 3 H. & N. 484; s. c., 4 H. & N. 822. This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to an order, it would seem that the mind of the purchaser after the manufacture was complete, should act upon the question whether the goods had complied with the contract. See Mucklow v. Mangles, 1 Taunt. 318; Bishop v. Crawshay, 3 B. & C. 415; Atkinson v. Bell, 8 B. & C. 277. This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason, that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample. Jenner v. Smith, L. R. 4 C. P. 270. In this case the plaintiff at a fair orally contracted to sell to the defendant two pockets of hops, and also two other pockets to correspond with a sample, which were lying in a warehouse in London, and which he was to forward. On his return to London, he selected two out of three pockets which he had there, and directed them to be marked to "wait the buyer's order." The buyer did no act to show his acceptance of the goods. The court held that the appropriation was neither originally authorized nor subsequently assented to by the buyer, and that the property did not pass by the contract. Brett, J., put in a strong form the objection to the view that the buyer could have impliedly assented to the appropriation by the seller. It was urged, he said, "that there was evidence that by agreement between the parties, the purchaser gave authority to the seller to select two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right to object, and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances therefore it is impossible to say that the property passed." Page 278. The same general principle was main-

tained in Kein v. Tupper, 52 N. Y. 550, where it was held that the act of the vendor putting the goods in a state to be delivered did not pass the title, so long as the acceptance of the vendee, provided for under the terms of the contract, had not been obtained.

The result is, that if this sale, executory as it was in its nature, had not fallen within the statute of frauds, there would have been no sufficient appropriation by the vendor to pass the title. The transaction, so far as it went, was even at common law an agreement to sell and not an actual sale.

(2) But even if it be assumed that this would have been an executed contract of sale in its own nature, without reference to the statute of frauds, was there "an acceptance and a receipt" of the goods, or a part of them, by the buyer, so as to satisfy the statute?

The acceptance and receipt are both necessary. The contract is not valid unless the buyer does both. These are two distinct things. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. Blackb. Sales, 106; see Brand v. Focht, 3 Keyes, 409; Stone v. Browning, 51 N. Y. 211.

There are some dicta, of various judges, cited by the plaintiffs to the effect that acceptance and receipt are equivalent. Per Crompton, J., and Cockburn, Ch. B., In Castle v. Sworder, 6 H. & N. 832; per Erle, C. J., In Marvin v. Wallis, 6 E. & B. 726. These remarks cannot be regarded as of any weight, being contrary to the decided current of authority. Indeed a late and approved writer says: "It may be confidently assumed however that the construction which attributes distinct meanings to the two expressions, 'acceptance' and 'actual receipt,' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in Smith v. Hudson." 6 B. & S. 436; Benj. Sales.

It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties after the parol contract and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use. If the case had been one of specific goods to be selected from a mass without any preparation to be made, and nothing to be done by the vendor but merely to select, the matter would have presented a very different aspect. This distinction is well pointed out by Willes, J., in Bog Lead Min. Co. v. Montague, 10 C. B. (N. S.) 481. In this case the question turned upon the meaning of the word "acceptance," in another statute, but the court proceeded on the analogies supposed to be derived from the construction of the same word in the statute of frauds. The question was as to what was necessary to constitute an "acceptance" of shares in a mining company, under 19 & 20 Viet. c. 47. The court having likened the case to that of a sale of chattels, said: "It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller. But where the contract is for a specific, ascertained chattel, the reasoning is altogether different. Equally, where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the assent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel." Pages 489, 490.

This view is confirmed by Maberley v. Sheppard, 10 Bing. 99. That was an action for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by the plaintiff, and, during the progress of the work, furnished the iron work and sent it to the plaintiff, and sent a man to help the plaintiff in fitting the iron to the wagon, and bought a tilt and sent it to the plaintiff to be put on the wagon. It was insisted, on these facts, that the defendant had exercised such a dominion over the goods sold as amounted to an acceptance. The court, per Tindal, C. J., held that the plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress, so that it still remained in the plaintiff's yard for further work until it was finished. The court added: "If the wagon had been completed and ready for delivery and the defendant had then sent a workman of his own to perform any additional work upon it, such

conduct on the part of the defendant might have amounted to an acceptance." See also Benj. Sales, c. 4, and cases cited.

The plaintiffs, in the case at bar, rely much upon the decision in Morton v. Tibbett, 15 Ad. & El. (N. S.) 428. They maintain that this case clearly establishes that there may be an acceptance and receipt of goods by a purchaser, within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract.

The expressions in Morton v. Tibbett are not to be pressed any further than the facts of the case require. The buyer of wheat by sample had sent a carrier to a place named in a verbal contract between him and the seller on August 25. The wheat was received on board of one of the carrier's lighters for conveyance by canal to Wisbeach, where it arrived on the 28th. In the mean time it had been resold by the buyer, by the same sample, and was returned by the second purchaser because found to be of short weight. The defendant then wrote to the plaintiff on the 30th, also rejecting it for short weight. An action was brought for goods bargained and sold. There was a verdict for plaintiff, with leave to move for a nonsuit. The question for the appellate court was, whether there was any evidence that the defendant had accepted and received the goods so as to render him liable as buyer. The court held that the acceptance under the statute was not an act subsequent to the receipt of the goods, but must precede, or at least be contemporaneous with it; and that there might be an acceptance to satisfy the statute, though the purchaser might on other grounds disaffirm the contract.

Morton v. Tibbett decides no more than this, viz., that there may be a conditional acceptance. It is as if the purchaser had said: "I take these goods on the supposition that they comply with the contract. I am not bound to decide that point at this moment. If, on examination, they do not correspond with the sample, I shall still return them under my common-law right, growing out of the very nature of the contract, to declare it void, because our minds never met on its subject-matter—non in hacc foedera veni." It is not necessary to decide whether this distinction is sound. It is enough to say that it is intelligible. The case, in no respect, decides that there can be an acceptance under the statute of frauds without a clear and distinct intent, or that unfinished articles can be presumed to be accepted before they are finished. The act of acceptance was clear and unequivocal. There was a distinct case of intermeddling with the goods in the exercise of an act of ownership—a fact entirely wanting in the case at bar. The proof of acceptance was the act of resale before examination. The point of the decision is, that this was such an exercise of dominion over the goods as is inconsistent with a continuance of the rights of property in the vendor, and therefore evidence to justify a jury in finding acceptance as well as actual receipt by the buyer. Hunt v. Hecht, 8 Exch. 814.

Even when interpreted in this way, Morton v. Tibbett cannot be regarded as absolutely settled law in England. See Coombs v. Bristol & Exeter Ry. Co., 3 H. & N. 510; Castle v. Sworder, 6 H. & N. 828. The court of queen's bench recognizes it, while the court of exchequer has not received it with favor. Later cases distinctly hold that the acceptance must take place after an opportunity by the vendee to exercise an option, or after the doing of some act waiving it. Bramwell, B., said in Coombs v. Bristol & Exeter Ry. Co.: "The cases establish that there can be no acceptance where there can be no opportunity for rejecting." All the cases were reviewed in Smith v. Hudson, 6 Best & Smith, 431 (A. D. 1865), where Hunt v. Hecht was approved. The two last cited cases disclose a principle applicable to the case at bar.

In Hunt v. Hecht the defendant went to the plaintiff's warehouse and there inspected a heap of ox bones, mixed with others inferior in quality. The defendant verbally agreed to purchase those of the better quality, which were to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, and he at once refused to accept them. There was held to be no acceptance. The case was put upon the ground that no acceptance was possible till after separation, and there was no pretense of an acceptance after that time. Martin, B., said that an acceptance, to satisfy the statute, must be something more than a mere receipt. It means some act done after the vendee has exercised or had the means of exercising his right of rejection.

In Smith v. Hudson, supra, barley was sold on November 3, 1863, by sample, by an oral contract. On the 7th it was taken by the seller to a railway station, where he had delivered grain to the purchaser on several prior dealings, and where it was his custom to receive it from other sellers. The barley was left at the freight-house of the railway, consigned to the order of the purchaser. It was the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination was not satisfactory, to reject it. This right continued in the present case, notwithstanding the delivery of the grain to the railway company. On the 9th the purchaser became bankrupt, and on the 11th the seller notified the station-master not to deliver the barley to the purchaser or his assignees. The court held that there was no acceptance sufficient to satisfy the statute. The most that could be said was, that the delivery to the com-

pany, considered as an agent of the buyer, was a receipt. It could not be claimed that it was an acceptance, the carrier having no implied authority to accept. The buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance. Opinion of Cockburn, Ch. J., 446; see, also, Caulkins v. Hellman, 47 N. Y. 449; Halterline v. Rice, 62 Barb. 593; Edwards v. Grand Trunk Ry. Co., 48 Me. 379, 54 Me. 111.

The case at bar only differs from these cases in the immaterial fact that the defendants, after the verbal contract was made, gave verbal directions as to the disposition which should be made of the goods after they were put into a condition ready for delivery. All that subsequently passed between them was mere words, and had not the slightest tendency to show a waiver of the right to examine the goods to see if they corresponded with the contract. Whatever effect these words might have had in indicating an acceptance, if the goods had been specific and ascertained at the time of the directions (see Cusack v. Robinson, 1 Best & S. 299), they were without significance under the circumstances, as the meeting of the minds of the parties upon the subject to be settled was necessary. Shepherd v. Pressey, 32 N. H. 57. In this case the effect of subsequent engagements by the buyer was passed upon as to their tendency to show a receipt of the goods by him. The court said: "As mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words after words used, looking to the future, to acts afterward done by the buyer toward carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." The case was stronger than that under discussion, as the goods were specific and fully set apart for the purchaser at the time of the subsequent conversations. No distinction is perceived between future acts to be done by the buyer and by the seller, as both equally derive their force from the buyer's assent.

I see no reason in the case at bar to hold that the defendants received the goods, independent of the matter of acceptance. There was no evidence that Percival became their agent for this purpose. The most that can be said is that they promised the plaintiffs that they would make Percival their agent. This promise being oral and connected with the sale, is not binding. They did not in fact communicate with him, nor did he assume any dominion or control over the property. The promissory representations of the plaintiffs are clearly within the rule in Shepherd v. Pressey, supra.

The whole case falls within the doctrine in Shindler v. Houston, 1 N. Y. 261, there being no sufficient act of the parties amounting to transfer of the possession of the lumber to the buyer and acceptance by him.

The judgment of the court below should be affirmed.

All concur.

Judgment affirmed.

GODDARD v. BINNEY.

(115 Mass. 450.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 4, 1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Plaintiff agreed to build a buggy for defendant, and to deliver it at a certain time. Defendant gave special directions as to style and finish. The buggy was built according to directions. Before it was finished, defendant called to see it, and in answer to plaintiff, who asked him if he would sell it, said no; that he would keep it. When the buggy was finished, plaintiff sent a bill for it, which defendant retained, promising to see plaintiff in regard to it. The buggy was afterwards burned in plaintiff's possession. The case was reported to the supreme judicial court.

C. A. Welch, for plaintiff. G. Putnam, Jr., for defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. St. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the

term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent, Com. (12th Ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East, 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

COLT and ENDICOTT, JJ., absent.

HUMBLE v. MITCHELL.

(11 Adol. & E. 205.)

Queen's Bench, Michaelmas Vacation. Nov. 27, 1839.

Assumpsit by the purchaser of shares in a joint-stock company, called the Northern and Central Bank of England, against the vendor for refusing to sign a notice of transfer tendered to him for signature, and to deliver the certificates of the shares, without which the shares could not be transferred.

Pleas. 1. That the contract mentioned in the declaration was an entire contract for the sale of goods, wares, and merchandises, for a price exceeding £10, and that plaintiff had not accepted or received the said goods, &c., or any part thereof, and did not give any thing in earnest to bind the bargain or in part payment, and that no note or memorandum in writing of the bargain was made and signed by defendant or his agent thereunto lawfully authorized. Verification.

2. That the contract was a contract for the sale of, and relating to an interest in and concerning lands, tenements, and hereditaments of and belonging to the said company, and that there was not in respect of, or relating to, the said contract, an agreement or any memorandum or note thereof in writing signed by defendant, or by any other person thereunto by him lawfully authorized according to the form of the statute etc. Verification.

Replication: to the first plea, denying that the contract was for the sale of goods, wares, etc.: to the second, denying that it was for the sale of an interest in lands etc. Issues thereon.

At the trial of the cause before Coleridge, J., at the Liverpool spring assizes, 1838, it was proved that the company was in possession of real estate; but no title deeds to the estate were produced; nor was it shewn what was the nature of the property belonging to the company, or the extent of their interest therein. The jury found a verdict for the plaintiff on both issues, subject to a motion to enter a verdict for the defendant. In the following Easter term Alexander obtained a rule nisi according to the leave reserved, citing, on the first plea, Ex parte Vallance, 2 Deac. 354, and, on the second plea, Ex parte The Vauxhall Bridge Company, 1 Glyn. & J. 101, and Ex parte Horne, 7 Barn. & C. 632.

Cresswell and Crompton now shewed cause. Mr. Alexander, contra.

Lord DENMAN, C. J. With respect to the question arising on the second plea, we have already disposed of it. The other point is whether the shares in this company are goods, wares, or merchandises, within the meaning of § 17 of the statute of frauds. It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the statute of frauds, and in the bankrupt act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the statute of frauds. Shares in a joint-stock company like this are mere choses in action, incapable of delivery, and not within the scope of the 17th section. A contract in writing was therefore unnecessary.

PATTESON, WILLIAMS, and COLERIDGE, JJ., concurred.

Rule discharged.

A question also arose as to the proper mode of estimating the damages in this action; but on this point the parties eventually agreed.

TISDALE v. HARRIS.

(20 Pick. 9.)

Supreme Judicial Court of Massachusetts. March Term, 1838.

Assumpsit by the plaintiff, an inhabitant of New York, against the defendant, a merchant of Boston, on a contract alleged to have been made in October, 1835, by which the defendant agreed to sell to the plaintiff two hundred shares, with all the earnings thereon, in the capital stock of the Collins Manufacturing Company, a corporation established in Connecticut, at $10.80 per share, the par value being $10 per share. The object of the suit was to recover $300, being the amount of a dividend of 15 per cent on the two hundred shares, declared on the 7th of October, 1835, and payable on the 15th.

At the trial, before Shaw, C. J., Nathaniel Curtis, junior, of the firm of Curtis & Leavins, being called as a witness by the plaintiff to prove the contract and the breach, the defendant objected to any parol evidence of the contract, because the contract was reduced to writing, and he produced a memorandum as follows, dated Boston, Oct. 14, 1835, directed to the defendant and signed by Curtis & Leavins:—"Sir, When you will furnish the certificate of 200 shares in the Collins Manufacturing Company to Mr. Samuel T. Tisdale, of New York, we hereby agree to pay you for the same at 108 cents per dollar or 8 per cent advance on the par amount of ten dollars each." But it was ruled, that this paper was not to be considered as the contract of the defendant to sell, but of the plaintiff by his agents to pay; that if the contract of the defendant to sell was not reduced to writing, the objection to the parol evidence could not prevail.

The witness testified, that at the request of the plaintiff he applied to the defendant about the 10th of October, 1835, in order to ascertain whether he would sell his shares; that the defendant said he was disposed to sell them at a fair price; but subsequently the witness offered him the par value; that the defendant said he would not sell at that rate, and that he had been recently informed that there would probably be a dividend of 10 per cent in December; that the witness took the refusal of them at $10.80 per share, until he could hear from New York; that having received a letter from the plaintiff, dated October 13th, he called on the defendant and asked him whether in offering the shares he intended to include all the earnings, and the defendant said yes, all that belongs to them, all that they have earned; that the witness read to the defendant the letter of October 13th, in which the plaintiff says he will take the stock at $10.80 cash, all earnings or dividends of the company up to the time of sale to be included; that the defendant wrote a letter to his agent at Hartford, instructing him to transfer the shares into the name of the plaintiff, and send the certificate to the defendant, and the defendant handed the letter to the witness to forward, which he did; that the defendant said he did not know the plaintiff, and he thought, as the shares would be transferred, he ought to have something to secure him, to which the witness assented, and the defendant wrote the memorandum which the witness signed, agreeing to pay him the money; that after sufficient time had elapsed for an answer, the witness called on the defendant, and at that time both the witness and the defendant had received information that a dividend of 15 per cent had been declared upon the shares; that at subsequent interviews the witness demanded the certificate of stock with an authority to receive the dividend, and was ready thereupon to pay the money, but the defendant declined giving the authority to receive the dividend; that some weeks afterwards, and after this action had been commenced, the defendant called on the witness for the money and threatened to sue him upon the contract which he had given for the plaintiff, if he did not pay it, whereupon the witness took the certificate and paid the money, but under an express declaration that it was not to prejudice the claim of the plaintiff for the dividend.

The question of fact was left to the jury, whether the bargain made by the defendant for the sale of the shares included all dividends then due or growing due, with directions, if it did, to find a verdict for the plaintiff; otherwise to find a verdict for the defendant.

A verdict was returned for the plaintiff; which the defendant moved to set aside: 1. Because parol evidence was admitted to add to and vary a written contract made subsequently to the conversation and letters referred to; 2. Because the contract set up was within the statute of frauds, being a contract for the sale of goods, wares, or merchandise for the price of fifty dollars or more, under which, at the time of action brought, there had been no acceptance of the same or any part thereof by the purchaser, nor any earnest or part payment made, and so was incapable of proof otherwise than by memorandum, in writing, signed by the defendant or his agent.

SHAW, C. J., delivered the opinion of the court.

Several points reserved at the trial of this cause are now waived, and the motion made by the defendant for a new trial is placed on two grounds.

First, that under the circumstances, parol evidence was not admissible, because the contract of the parties was reduced to writing, and that such writing was the best evidence. But the court are of opinion, that the objection is not sustained by the fact. No contract in writing was made by the defend-

ant with the plaintiff, to sell those shares. After the negotiation had resulted in an agreement, the agent of the plaintiff, in the name of his firm, gave the defendant a memorandum in writing, undertaking to pay the money, on the performance of the defendant's agreement to transfer the shares. But it was not signed by the defendant, nor by any person for him, nor did it purport to express his agreement. The court are therefore of opinion, that the defendant's agreement not being reduced to writing, the parol evidence was rightly admitted.

But by far the most important question in the case arises on the objection, that the case is within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows. "No contract for the sale of goods, wares, or merchandise for the price of ten pounds ($33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agent thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring state, for the price of more than ten pounds, and no part having been delivered, and no purchase-money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares, or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29 Car. II., in the same terms, which ours has copied, has not been definitively settled in England. In the case of Pickering v. Appleby, Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in chancery, the better opinion seemed to be, that shares in incorporated companies were within the statute, as goods or merchandise. Mussell v. Cooke, Finch, Prec. 533; Crull v. Dodson, Sel. Cas. Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheat. 89, note; 3 Starkie, Ev. (4th Am. Ed.) 608.

Supposing this a new question now for the first time calling for a construction of the statute, the court are of opinion, that as well by its terms as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. "Bona," as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal and coercive, and tended to deprive a man in trade of all his property. But most joint stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this: that the statute provides that such contract shall not be good, etc., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication the statute applies only to goods of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, etc. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary indicia of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term "goods," as they are within the reason and policy of the act, the court are of opinion, that a contract for the sale of shares, in the absence of the other

requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside, and plaintiff nonsuit.

BALDWIN v. WILLIAMS.

(3 Metc. 365.)

Supreme Judicial Court of Massachusetts. Nov. Term, 1841.

This case was tried before Wilde, J., who made the following report of it:—

This was an action of assumpsit, and the declaration set forth an agreement of the plaintiff that he would bargain, sell, assign, transfer, and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24th, 1835, for the payment of $1,500; the other dated May 5th, 1836, for the payment of $500; and both payable to the plaintiff or order on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff $1,000 in cash, and to give the plaintiff a post note, made by the Lafayette Bank, for $1,000, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams for $1,000.

The plaintiff at the trial proved an oral agreement with the defendant as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff without recourse to him in any event, and a demand upon the defendant to fulfil his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that any thing passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing nor proved by any note or memorandum in writing signed by the defendant or his agent, and nothing was received by the purchaser, nor given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand if in the opinion of the whole court the agreement set forth in the declaration falls within the statute of frauds (Rev. St. c. 74, § 4); otherwise, the nonsuit to be taken off, and a new trial granted.

Mr. Clarke, for plaintiff. S. D. Parker, for defendant.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

The plaintiff's counsel contends in the first place that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and in the second place that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends that an agreement to exchange notes is a mutual contract of sale. But it is not necessary to decide this question, for the agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes $2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." "Merx est quicquid vendi potest."

In Tisdale v. Harris, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in Humble v. Mitchell, 3 Perry & D. 141, 11 Adol. & E. 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of Tisdale v. Harris is very cogent and satisfactory; and it is supported by several other cases. In Mills v. Gore, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. St. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in Clapp v. Shephard, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. St. c. 81, § 8, say that the words "'goods or chattels' are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned."

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are movable goods, and so far as these words may relate to the question under consideration they seem to have

the same meaning. But however this may be, we think the present case cannot be distinguished in principle from Tisdale v. Harris; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsult must be overruled.

ALLARD v. GREASERT.

(61 N. Y. 1.)

Commission of Appeals of New York. Sept. Term, 1874.

Action for goods sold and delivered. Defendant firm orally agreed with an agent of plaintiffs to buy by sample the following bill of hats and caps:

Of case No. 361, ½ doz. child's Leghorn sylvans, at $11 per doz.	$ 5 50
Of case No. 312, one doz. harvest hats, at	4 50
Of case No. 371, half doz. Panama hats, at	28 50 a doz.
Of case No. 372, half doz. Panama hats, at	36 00 a doz.
Of case No. 326, one doz. palm leaf hats, at	2 50 a doz.
Of case No. 324, one doz. palm leaf hats, at	3 00 a doz.
Of case No. 329, one doz. white Glenwood, at	15 00 a doz.
Of case No. 159, one doz. black Alpine, at	24 00 a doz.
Of case No. 309, one doz. Leg. harvest, at	3 25 a doz.

The samples were shown by the agent, and the prices of the different styles named, and a memorandum made by the agent of the number of each kind purchased. No memorandum was made in writing, and signed by either party. When the goods were sent, by express, as ordered, defendants refused to receive them because the one dozen harvest were in some slight particular different from the samples shown. Defendants moved for a nonsuit because (1) "that the agreement under which the plaintiffs seek to recover is within the statute of frauds, and void; (2) that the order for the goods constitutes one entire contract, and the plaintiffs have failed to fulfill, on their part, to deliver the harvest hats of the description ordered; that, by reason of said failure, the defendants had a right to refuse to receive any of the goods sent." The court nonsuited plaintiffs on the last ground.

Daniel Wood, for appellants. Bowen & Pitts, for respondents.

EARL, C. The judge at the circuit regarded this as an entire contract of sale, and not severable; and if he was right in this, he properly nonsuited the plaintiffs upon that ground. If it was an entire contract, within the meaning of the law, the plaintiffs could recover only by showing entire performance, by a full delivery of all the articles purchased. But it is not necessary, in this case, to determine whether this was an entire or a severable contract, because the defendants also moved for a nonsuit upon the ground that the contract of sale was void under the statute of frauds. Although the judge did not place the nonsuit upon this ground, it may be considered here. He nonsuited the plaintiffs, and even if he gave a wrong reason for it, and placed it upon the wrong ground, the nonsuit may be upheld upon any ground appearing in the case. Curtis v. Hubbard, 1 Hill, 336; Simar v. Canaday, 53 N. Y. 298; Deland v. Richardson, 4 Denio, 95.

Even if this were a severable contract so far as relates to the performance of the same, within the meaning of the statute of frauds it is an entire contract. The reasons for holding it to be such are clearly set forth in Baldey v. Parker, 2 B. & C. 41, and Story, Sales, § 241. This, within the meaning of the statute of frauds, is a contract for the sale of goods for the price of $50 or more, and as there was no note or memorandum or payment, the question to be determined is, whether the goods were accepted and received by the buyers so as to satisfy the statute. By the terms of the contract, the goods were to be delivered to the Merchants' Union Express, to be carried to the defendants, and they were so delivered. It is well settled that when there is a valid contract of sale, a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer. It was decided in Rodgers v. Phillips, 40 N. Y. 519, that a delivery, according to the contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance as to answer the statute of frauds. But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires acceptance, a delivery to a carrier selected by the buyer will answer that portion of the statute which requires the buyer to receive. Cross v. O'Donnell, 44 N. Y. 661. So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority, that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. Benj. Sales, 124. The cases upon this subject are cited and commented upon, and the principles applicable to the question are so fully set forth in the two recent cases above referred to that no further citation of authorities or extended discussions at this time is important. It will be found by an examination of the authorities, that in most of the cases where a delivery to a carrier has been held to satisfy the statute of frauds, there had been a prior acceptance of the goods by the buyer or his agent. A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act requiring the exercise of no discretion. But there is no reason for holding that the buyer in such case intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing. This case furnishes as good an illustration as any. The goods were boxed; the carrier could know nothing about

them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive and transport them. In such a case, it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent. Here it is not claimed that there was express authority conferred upon the carrier to accept, and the circumstances are not such that such authority can be implied.

Upon this last ground therefore the nonsuit was proper, and the judgment must be affirmed, with costs.

All concur.

SAFFORD et al. v. McDONOUGH.

(120 Mass. 290.)

Supreme Judicial Court of Massachusetts. Suffolk. May 6, 1876.

T. H. Sweetser and B. F. Hayes, for plaintiffs. S. A. B. Abbott, for defendant.

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant. There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise. He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the superior court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above named had been proved, the title in the property would have passed to the defendant, so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. Haskins v. Warren, 115 Mass. 514; Morse v. Sherman, 106 Mass. 430; Townsend v. Hargraves, 118 Mass. 325. But the question is whether the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. Knight v. Mann, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In Baldey v. Parker, 2 B. & C. 37, 44, Holroyd, J., says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." Benjamin on Sales, (Am. Ed.) 151, and cases cited; Browne, St. Fraud, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. Cusack v. Robinson, 1 B. & S. 299, 308; Castle v. Sworder, 6 H. & N. 828; Dodsley v. Varley, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods, but claimed and asserted their lien as vendors for the price. We are therefore of opinion that the ruling of the superior court was correct.

Exceptions overruled.

ENDICOTT and LORD, JJ., absent.

CAULKINS v. HELLMAN.

(47 N. Y. 449.)

Court of Appeals of New York. 1872.

Action to recover for wines and casks sold.

Stephen K. Williams, for appellant. E. G. Latham, for respondents.

RAPALLO, J. The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract.

Where a valid contract of sale is made in writing a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price; and this acceptance must be voluntary and unconditional. Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. This distinction seems to have been overlooked in the charge. The learned judge instructed the jury, as a matter of law, that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one, and might be enforced notwithstanding it was not in writing. The attention of the jury was directed to the inquiry whether the plaintiffs had faithfully performed their part of the contract rather than to the action of the defendant, and the judge proceeded to state that if the wine was delivered to the express company at Blood's Station in good order, in merchantable condition, and corresponded in quality and all substantial and material respects with the samples, then he instructed the jury as a matter of law, that if they found the contract as Gordon testified with respect to the place of delivery, that was a complete delivery under the contract, and passed the title from the plaintiffs to the defendant, and the plaintiffs were entitled to recover the contract price of the wines.

The plaintiff's counsel suggests in the statement of facts appended to his points, that Gordon was the agent of the defendant, to accept the goods at Blood's Station. But this statement is not borne out by the evidence; Gordon was the agent of the plaintiffs for the sale of the goods; it was incumbent upon them to make the shipment. All that Gordon testifies to is that the defendant requested him to make the best bargain he could for the freight. He does not claim that he had any authority to accept the goods for the defendant.

According to the defendant's testimony Gordon clearly had no such authority, nor did the defendant designate any conveyance, and the judge submitted no question to the jury as to the authority either of Gordon or the express company to accept the goods. On the contrary, he repeated that if when the wine was delivered at Blood's Station it was in good order and corresponded with the samples, the plaintiffs would be entitled to a verdict for the contract price, upon the ground that the parties by the contract (assuming it to be as claimed by the plaintiffs), fixed upon that station as the place of delivery; "that it was true that the defendant was not there to receive it, and had no agent at Blood's Station to receive it, and had no opportunity to inspect it there; but that that was a contingency he had not seen, and which he might have guarded against in the contract."

It is evident that the learned judge applied to this case the rule as to delivery, which would be applicable to a valid, written contract of sale, but which is inapplicable when the contract is void by the statute of frauds.

The effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was very fully discussed in the case of Norman v. Phillips, 14 Mees. & W. 277, and a verdict for the plaintiff founded upon such a delivery, and upon the additional fact that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. The English authorities on the subject are reviewed in that case, and the American and English authorities bearing upon the same question are also referred to in the late cases of Rodgers v. Phillips, 40 N. Y. 519, and Cross v. O'Donnell, 44 N. Y. 661. The latter case is cited by the counsel for the plaintiffs as an authority for the proposition that a delivery to a designated carrier is sufficient to take the case out of the statute; but it does not so decide. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times, and that after the purchaser had himself inspected and accepted the goods purchased, the delivery of them by his direction to a designated carrier was a good delivery, and the carrier was the agent of the purchaser

to receive them. No question however arises in the present case as to a delivery to a designated carrier, as the evidence in respect to the agreed mode of delivery is conflicting, and no question of acceptance by the carrier as agent for the defendant was submitted to the jury.

The judge submitted to the jury two questions, to which he required specific answers.

1st. Was the wine delivered at the railroad station at the time agreed upon by the parties, and was it then in all respects in good order, and like the samples exhibited by the plaintiff to the defendant? and,

2d. Was the wine accepted by the defendant after it reached his place of business in New York?

The jury answered both of these questions in the affirmative, and it is now claimed that the answer to the second question renders immaterial any error the judge may have committed in respect to the effect of the delivery at the station.

It is difficult to find any evidence justifying the submission to the jury of the second question; but no exception was taken to such submission. The motion for a nonsuit would have raised that point, were it not for the fact that there was evidence to go to the jury on the claim of $52 for barrels, and this precluded a nonsuit. We think however that the error in the charge may have misled the jury in passing upon the second question; at all events, it is not impossible that it should have done so. Having been instructed that upon the fact as they found it in respect to the agreement for a delivery at Blood's Station, the title to the goods had passed to the defendant before the receipt of them at New York, and that their verdict must be for the plaintiffs, they may have examined the question of his acceptance of them at New York with less scrutiny than they would have exercised had they been informed that the result of the case depended upon their finding on that question. And the construction of the defendant's acts and language may, in some degree, have been influenced by the consideration that when the wine arrived in New York the title had, according to the theory on which the case was submitted to them, passed to the defendant, and he had no right to reject the wines. Furthermore, we think the judge erred in excluding the evidence of the contents of the telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. If, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the res gestæ. A bona fide attempt, immediately on the receipt and examination of the wine, to communicate such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant. The objection to the evidence of the contents of the telegram was not placed on the ground of omission to produce the original, and the judge in his charge instructed the jury that the attempt to send this telegram did not affect the plaintiffs' rights, for the reason that it was not shown to have been received by them, and this was excepted to. In Norman v. Phillips, 14 Mees. & W. 277, the defendant was allowed to prove that on being informed by the railway clerk that the goods were lying for him at the station, he said he would not take them, and stress was laid upon the fact. Yet this statement to the clerk was not communicated to the plaintiffs. Evidence of an attempt to send a message to them to the same effect, though unsuccessful, would have been no more objectionable than the declaration to the clerk. The acts of the defendant at the time of the receipt of the goods, and his bona fide attempt to communicate to the plaintiffs his rejection of them were I think material and competent to rebut any presumption of an acceptance arising from their retention by him.

The judge was requested to instruct the jury that the true meaning of the defendant's letter of March 31 was a refusal to accept the wine under the contract. A careful examination of that letter satisfies us that the defendant was entitled to have the jury thus instructed. The letter clearly shows that the defendant did not accept or appropriate the wines. After complaining in strong language of their quality and condition, and of the time and manner of their shipment, he says to the plaintiffs, "What can be done now with the wine after it suffered so much, and shows itself of such a poor quality? I don't know myself and am awaiting your advice and opinion." He concludes by expressing his regret that their first direct transaction should have turned out so unsatisfactory, and by stating that he cannot be the sufferer by it, and he awaits their disposition.

This language clearly indicates an intention to throw upon the plaintiffs the responsibility of directing what should be done with the wine, and is inconsistent with any acceptance or appropriation of it by the writer.

For these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

HOWE v. HAYWARD.

(108 Mass. 54.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1871.

T. G. Kent, for plaintiff. P. E. Aldrich, for defendant.

CHAPMAN, C. J. It appears by the report, that the parties made an oral contract for the sale of property by the plaintiff to the defendant, and that each of them deposited the sum of $200 in the hands of one Taft. The plaintiff contended that the money deposited by the defendant was given in earnest to bind the bargain, or in part payment. The defendant contended that it was under an agreement that the sum should be forfeited in case he refused without just cause to perform the contract. The jury found that it was not deposited in earnest or in part payment, but was deposited "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so;" and under the instruction of the court found for the defendant. The plaintiff contends that the finding should have been for the plaintiff, because, if the money was deposited as a forfeiture, as stated, it amounted to "earnest," within the meaning of the statute of frauds. This depends upon the proper definition of that term as used in the statute.

The idea of "earnest," in connection with contracts, was taken from the civil law. Guterbock on Bracton (Am. transl.) 145. It is not necessary to consider its precise effect under that law. As used in the statute of frauds, "earnest" is regarded as a part payment of the price. 2 Bl. Comm. 447; Pordage v. Cole, 1 Saund. 319i; Langfort v. Tiler, 1 Salk. 113; Morton v. Tibbett, 15 Q. B. 428; Walker v. Nussey, 16 M. & W. 302; 1 Dane, Ab. 235. The case of Blenkinsop v. Clayton, 7 Taunt. 597, cited by the plaintiff, turned on the question of delivery.

The deposit with Taft was not therefore equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds. The ruling was correct.

Judgment on the verdict.

BUTLER v. THOMSON et al.

(92 U. S. 412.)

Supreme Court of the United States. Oct. Term, 1875.

Error to the circuit court of the United States for the Southern district of New York.

Mr. William M. Evarts for the plaintiff in error. Mr. E. H. Owen, contra.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff alleged that on the eleventh day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same, and pay the purchase-money therefor; that the iron arrived in due time, and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of $6,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial, the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12¾ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers; viz.:—

"New York, July 10, 1867. Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67. White & Hazzard, Brokers."

The defendants contend, that, under the statute of frauds of the state of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. p. 136, § 3) is in these words:—

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The eighth section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretense that any of the goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries—to wit, a written agreement—is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the statute of frauds.

The contention would be the same if the articles sold had not been of the price named in the statute; to wit, the sum of fifty dollars.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." Gardner v. Lane, 12 Allen, 39, 43. A learned author says, "If any one of the ingredients be wanting, there is no sale." Atkinson, Sales, 5. Benj. Sales, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser. These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which

a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In Thornton v. Kempster, 5 Taunt. 788, it is said,—

"Contracts may exist, which, by reason of the statute of frauds, could be enforced by one party, although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the evidence. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., c. 3, on which this decision is based, that "no contract for the sale of goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good except the buyer," &c., is in legal effect the same as that of the statute of New York already cited. See Justice v. Lang, 42 N. Y. 493, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

In Newell v. Radford, L. R. 3 C. P. 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer, and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders"); but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of Sievewright v. Archibald, 6 Eng. L. & Eq. 286; s. c. 17 Q. B. 103; Benj. on Sales, p. 224, sect. 200. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron." The bought note was for "500 tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says, "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and vice versa as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note,—that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose,—that is, the sold note.

We do not discover in Justice v. Lang, reported in 42 N. Y. 493, and again in 52 N. Y. 323, any thing that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

Judgment reversed, and cause remanded for a new trial.

SANBORN et al. v. FLAGLER.

(9 Allen, 474.)

Supreme Judicial Court of Massachusetts. Nov., 1864.

Contract brought by plaintiffs, who were partners under the firm name of Sanborn, Richardson & Co., against John H. Flagler and — — Holdane, as partners under the firm name of Holdane & Co. The writ was served only upon Flagler. The plaintiffs alleged that the defendants had refused to deliver to them fifty tons of best refined iron, in accordance with a written agreement entered into between them. The defendant set up among other defenses the statute of frauds. One of the plaintiffs was called to the stand, and produced to be offered in evidence a paper, of which the following is a copy as near as can be made:

"Will deliver S. R. & Co. best refined iron 50 tons within 90 days—at 5 ct p lb 4 of cash. Plates to be 10 to 16 inches wide and 9 ft to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F. J. B. R."

The defendant objected that the paper was not a sufficient memorandum in writing of the alleged bargain signed by the party to be charged, and that parol evidence was not admissible so as to make it such a memorandum as could be admitted. The judge ruled that the paper was a sufficient memorandum, and would bind the defendant if he was a member of the firm of Holdane & Co. The witness then testified that the agreement was written by him, and that he and the defendant signed their initials, the defendant writing the initials "J. H. F.," and he the initials "J. B. R.;" and that before the defendant left the plaintiffs' office, and before 2 o'clock, he accepted the proposition, and so stated to the defendant verbally. The witness testified that he signed his initials on behalf of the plaintiffs, and that he understood the defendant to sign for the firm of Holdane & Co. This evidence was not denied by the defendant. The judge ruled that said paper, with the explanation given, if Richardson was believed, was a sufficient note or memorandum, and was binding on the defendant if the jury found him to be a partner as alleged. The jury found a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for plaintiffs. C. T. Russell, for defendant.

BIGELOW, C. J. The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence aliunde.

The objections on which the defendants rely are twofold. The first is that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, the essential elements of a contract. But this position is not tenable. The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment, and the time within which the article was to be delivered, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection if well founded. There can be no contract or valid memorandum of a contract which does not shew who are the contracting parties. But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price and on specified terms of payment is an agreement to sell. Delivery of goods at a stipulated price constitutes a sale; an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can therefore see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum in this respect than that of Salmon Falls Manuf. Co. v. Goddard, 14 How. 446. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of Bailey v. Ogden, 3 Johns. 399, there was nothing in the memorandum to shew which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document

drawn up in the haste of business and intended to express in a few words the terms of a bargain, we cannot entertain a doubt that it indicates with sufficient clearness that the plaintiffs were the purchasers, and the defendant the seller of the merchandise, on the terms therein expressed. Indeed we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly shew that the latter is the purchaser and the former the seller as if the agreement had been in express terms by one to sell goods to the other.

The other objection to the memorandum is that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby bind his principal; and parol evidence is competent to prove that he signed the memorandum in his capacity as agent. On the same principle, a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shewn by extrinsic evidence. Soames v. Spencer, 1 D. & R. 32; Long, Sales, 38; Browne, St. Fraud, § 367; Higgins v. Senior, 8 M. & W. 834; Williams v. Bacon, 2 Gray, 387, 393. Besides, in the case at bar, the action is in effect against Flagler alone. He only has been served with process and appears to defend the action. Whether he signed as agent for the firm or in his individual capacity is immaterial. In either aspect he is liable on the contract.

It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to explain and apply them. Phillimore v. Barry, 1 Camp. 513; Salmon Falls Manuf. Co. v. Goddard, ubi supra; Barry v. Combe, 1 Pet. 640. Exceptions overruled.

COMMONWEALTH v. FLEMING.

(18 Atl. Rep. 622, 130 Pa. St. 138.)

Supreme Court of Pennsylvania. Nov. 4, 1889.

Error to court of quarter sessions, Mercer county.

The plaintiff in error, Joseph Fleming, being a wholesale liquor dealer, licensed and carrying on business in Allegheny county, sold and sent from his place of business, C. O. D., to Mercer county, where he had no license, liquors ordered by persons in the latter county. For this he was, at the court of quarter sessions of Mercer county, indicted, tried, convicted, and sentenced for selling liquor therein without a license. He now brings error.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

George Shiras, Jr., and *William S. Pier*, for plaintiff in error. *G. W. McBride*, Dist. Atty., *J. A. Stranahan*, and *S. H. Miller*, for the Commonwealth.

GREEN, J. In the case of Garbracht v. Com., 96 Pa. St. 449, which was an indictment for selling liquor without license, we held that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him." In that case the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier to be forwarded to its destination in Mercer county. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal held any license for the sale of liquor in Mercer county. This decision was not changed in the least upon a subsequent trial of the same defendant on a different state of facts, as reported in 1 Penny. 471. In the case now under consideration the liquor was sold upon orders sent by mail by the purchasers, living in Mercer county, to the defendant, who is a wholesale liquor dealer in Allegheny county. The goods were set apart at the defendant's place of business in Allegheny county, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer county, and by the carrier transported to Mercer county, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the Case of Garbracht, supra, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of Garbracht.

It is claimed, and it was so held by the court below, that, because the goods were marked "C. O. D.," the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of the delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liabilities to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the seller to the carrier; and whether the carrier receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods. Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to recover the goods. This was the case in Henderson v. Lauck, 21 Pa. St. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far

as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser absolutely to pay the price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them even as against the seller is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, where the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is Higgins v. Murray, 73 N. Y. 252. There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with, and did not affect, his right to enforce the defendant's liability. In the course of the opinion, Chief Justice CHURCH said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. * * * Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of, and for the benefit of, the defendant, (assuming that it was done in accordance with the directions,) it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. * * * As before stated, the point as to who had the title is not decisive. It may be admitted

that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In Hutchinson on Carriers, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty,—that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal *status* of the parties results that the seller has a remedy for the price of his goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them.

Thus far we have regarded the transactions between the parties in its aspect as a civil contract only; but, when viewed in its aspect as the source of a criminal prosecution, the transaction becomes much more clear of doubt. It is manifest that, when the purchaser ordered the goods to be sent to him C. O. D., he constituted the carrier his agent, both to receive the goods from the seller, and to transmit the price to the seller. When, therefore, the goods were delivered to the carrier at Pittsburgh for the purpose of transportation, the duty of the seller was performed, as we have already seen, so far as he and the purchaser were concerned, and as between them the transaction was complete. The duty of transportation devolved upon the carrier, and for this he was, in one sense, the agent of the seller, as well as of the purchaser; but, as it was to be at the expense of the purchaser, the delivery to the carrier was a delivery to the purchaser; and this was ruled in Garbracht's Case. The injunction to the carrier to collect the money on delivery imposed an additional duty on the carrier, which the carrier was, of course, bound to discharge. This arrangement was a matter of convenience, both to the purchaser and the seller, relative to the payment and transmission of the price; but that is all. To convert this entirely innocent and purely civil convention, respecting the mode of collecting the price of the goods, into a crime, is, in our judgment, a grave perversion of the criminal law, to which we cannot assent. As a matter of course, there is an utter absence of any criminal intent in the case. The defendant had a license. The sale was made at his place of business, and both the sale and delivery were completed within the territory covered by the license. If, now, a criminal character is to be given to the transaction, it must be done by means of a technical inference that the title did not pass until the money was paid; and thus that the place of sale, which in point of fact was in Allegheny county, was changed to Mercer county, where no sale was made. Even granting that, in order to conserve the vendor's lien, such a technical inference would be justified for the purposes of a civil contract, it by no means follows that the plain facts of the case must be clothed with a criminal consequence on that account. So far as the criminal law is concerned, it is only an actual sale without license that is prohibited. But there was no such sale, because all the essential facts which constituted the sale transpired in Allegheny county, where the defendant's license was operative. The carrier, being the agent of the purchaser to receive the goods, does receive them from the seller in Allegheny county, and the delivery to him for the purpose of transportation was a delivery to the purchaser. This is the legal, and certainly the common, understanding of a sale. The statute, being criminal, must be strictly construed; and only those acts which are plainly within its meaning,

according to the common understanding of men, can be regarded as prohibited criminal acts. We cannot consider, therefore, that a mere undertaking on the part of the carrier to collect the price of the goods at the time of his delivery to the purchaser, though the payment of the price be a condition of the delivery, can suffice to convert the seller's delivery to the carrier for transportation and collection into a crime. We therefore hold that the sales made by the defendant upon orders, C. O. D., received from the purchasers were not in violation of the criminal statute against sales without license, and the conviction and sentence in the court below must be set aside. The judgment of the court of quarter sessions is reversed, and the defendant is discharged from his recognizance upon this indictment.

WILLIAMS, J., delivered a dissenting opinion.

GIBBS v. BENJAMIN.

(45 Vt. 124.)

Supreme Court of Vermont. Montpelier. Nov., 1872.

*Book account. The facts reported by the auditor sufficiently appear in the opinion of the court. The court at the March term, 1871, Rutland county, WHEELER, J., presiding, rendered judgment on the report for the plaintiff for the price of the wood sued for. Exceptions by the defendant. *125

R. C. Abell, for plaintiff. Joseph Potter and Edgerton & Nicholson, for defendant.

REDFIELD, J This action is book account to recover the price of cord wood alleged by the plaintiff to have been sold the defendant in April, 1869. Most of the wood was piled on the margin of Lake Champlain, on plaintiff's farm, in Benson, in this state. Two small parcels of the wood were on the opposite shore of the lake. About a week after the negotiation (which plaintiff claims was a sale), the wood was carried away by the flood of the lake, and lost. The report of the auditor gives a minute detail of every incident of the negotiation, and submits them to the court to interpret their legal effect.

*127 *The parties met at the instance of the plaintiff, and inspected the wood; after some discussion, it was agreed that the defendant should purchase the wood at $3.50 per cord, the defendant insisting that a portion of it was less than four feet in length, and that some abatement should be made for such deficiency; to which the plaintiff did not assent. It was a part of the agreement, that the parties should meet and measure the wood, and accordingly, on the 19th day of April, 1869, they proceeded to measure the several piles of wood, each taking memoranda of the measurement as it proceeded. The defendant measured the length and still claimed some abatement therefor. The plaintiff insisted that by the terms of the agreement, the wood was to be assumed to be four feet in length. "As it was getting dark when the measurement was completed, the parties went home, each with the figures for having a computation of the quantity of wood made therefrom"; and both parties expressed their inability to make the computation at the time. On the 21st of April, the defendant, with his son, went to the plaintiff's house, to see if they could agree about the quantity of wood that had been measured. The plaintiff had computed the quantity of wood at 204 cords and some feet; "but, by mistake, had omitted one pile, containing some 60 cords." The defendant informed the plaintiff that he made the quantity 246 cords, after abating five inches for deficiency in the length of some portion of it, and proposed to the plaintiff that he would take the wood at 246 cords, as he made it, or at 204 cords, as computed by the plaintiff. The plaintiff replied that he might have it at 204 cords, and the defendant agreed to take it. After the defendant left, the plaintiff discovered the mistake, and immediately notified the defendant that he could not have the wood at 204 cords. The defendant sent back word that he would again meet the plaintiff, and did so in the afternoon of the same day. Plaintiff declined to let defendant have the wood at 204 cords, but consented to throw off 5 inches in length from two piles. Defendant refused to take the wood, except at 204 cords. The auditor has stated many other incidents; but this is a substantial statement of the facts, as detailed by the auditor. It is not claimed that the two piles of wood across the lake were delivered to the defendant, either actually or constructively; so the controversy is confined to the wood situate on the plaintiff's farm in Benson.

I. The defendant agreed to purchase all the wood piled on the plaintiff's farm on the margin of the lake, at $3.50 per cord; and if this comprised the whole case, it would be, in the language of Lord Brougham in the case of Logan v. Le Mesurier, 6 Moore P. C., 116 "Selling an ascertained chattel for an ascertainable sum"; and by the rule of law applied to the sale of ponderous and bulky articles, such as wood, logs, coal and the like, would effectually pass the property to the vendee. Hutchins v. Gilchrist, 23 Vt. 88; Sanborn v. Kittredge, 20 Ib. 639; Birge et al. v. Edgerton, 28 Vt. 291. But this case has other elements which impress upon it quite a different character. It was part of the contract that the parties should measure the wood and ascertain the quantity. They met for that purpose, and disagreed; and that disagreement was as to the substance of the contract. The plaintiff insisted that it was agreed and part of the contract, that defendant should take the wood at "running measure"; the defendant claimed that he purchased solid cords; and that issue grew into controversy, but was never settled. The report does not state when the price was to be paid; but in the absence of any special agreement, it is to be assumed that it was to be paid on delivery.

*128 The principle is well settled, and uniform in all the cases, that when any thing remains to be done by either, or both, parties, precedent to the delivery, the title does not pass. And so inflexible is the rule that, when the property has been delivered, if any thing remains to be done by the terms of the contract, before the sale is complete, the property still remains in the vendor. Parker v. Mitchell, 5 N. H. 165; Ward v. Shaw, 7 Wend. 404. The contract must be executed, to effect a completed sale, "and nothing further to be done to ascertain the quantity, quality, or value, of the property." BENNETT, J., in Hutchins v. Gilchrist, supra. "The general rule in relation to the sale of personal property, is, that if any thing remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties." POLAND, J., in Hale v. Huntley et al. 21 Vt. 147; Chit. *Con. 396. *129 This rule of law applied to the facts as reported in this case, retains the property in the wood in the plaintiff, and leaves the contract executory, and, as a sale, incomplete. The case of Simmons v. Swift, 5 B. & C. 857, is much like this, but much stronger in its facts. It was an action for the price of a stack of bark sold at £9 5s. per ton. After the sale, it was agreed between the parties that the bark should be weighed by two persons, each party to name one. Part of the bark was weighed and delivered, the residue was much injured by a flood, before it was delivered, and for that reason, the buyer refused to take it. The court held that the bark was to be weighed before delivery, to ascertain the price; and as that act had not been done, the property remained in the seller, and that he must bear the loss. This was not a case where a portion was sold to be measured or weighed from the bulk, which would have no identity until severed and set apart; but the whole stack was sold, and a portion weighed and delivered. The subject of the sale was "ascertained" and the price "ascertainable;" yet the weighing was a thing to be done before the property passed to the purchaser.

In case of the insolvency of the defendant, it could hardly be claimed that the wood became part of his assets. Or if attached by his creditor, such creditor could hardly show a color of right, as against the plaintiff.

The plaintiff's counsel seem much to rely on the case of Gilmour v. Supple, 11 Moore P. C., 551, reported in 7 Am. Law Reg. (old series), 246. In that case, the plaintiff sold a raft of lumber for a fixed price per foot, with specification of the measurement of each log, made by a public officer appointed for that purpose under the law of Canada, amounting in the aggregate to 71,443 feet, "to be delivered at Indian Cove booms." The seller conveyed the raft to the place of delivery, made it fast to the booms, and notified the servant of the purchaser of the delivery, who took possession of the same. The judge charged the jury, that "if there was an actual delivery at the place, into the possession of defendant's servants, the plaintiff was entitled to recover." The jury found for the plaintiff. Mr. Justice CRESSWELL, in delivering the judgment, reviews, approvingly, the
*130 English cases of *Hanson v. Meyer, 6 East, 614, Rugg v. Minett, 11 Ib. 210, and Wallace v. Breeds, 13 Ib. 522, and Simmons v. Swift, ut supra, and says: "If it appears that the seller is to do something to the goods sold on his own behalf, or if an act remains to be done by, or on behalf of, both parties, before the goods are delivered, the property is not changed." The learned judge then proceeds to show that the rule of law, well established by these cases, had no application to that case, and in conclusion says: "There was, therefore, nothing to be done by the seller on his own behalf; he had ascertained the whole price of the raft by the measurement previously made; he had conveyed the raft to Indian Cove, and, according to the finding of the jury, had delivered it there. Nor was there anything further to be done, in which both were to concur, as in Simmons v. Swift." The plaintiff recovered because the sale was completed by delivery, and nothing further remained to be done.

II. We think this case within the statute of frauds. Our statute is a substantial re-enactment of the 29 Charles II., and has received the same construction given to the English statute. Spencer v. Hale, 30 Vt. 314, was a book action for the price of a quantity of fence posts, inspected and purchased by defendant, to be delivered on the cars at Shaftsbury. The plaintiff delivered the posts on the cars furnished by defendant, at Shaftsbury, and they were conveyed to the defendant's residence in New York. The defendant claimed that he never "accepted" them. The case turned upon the effect of the statute of frauds. Chief Justice REDFIELD delivered the opinion of the court, holding that the reception of the posts on board the cars furnished by the purchaser, and the forwarding of them by the station man, who, for that purpose, was his agent, was an acceptance; and in defining the rule for compliance with the statute of frauds, says: "It is undoubtedly true that the defendant, at the time and place, had a right to repudiate the posts after delivery. In other words, in order to perfect the case under the statute of frauds, something more is necessary than a mere delivery of the goods. In the language of the statute, the purchaser must 'accept and receive part of the goods.'" Authorities might readily be multiplied,
affirming the *rule in substantially the *131 same language; but we recur to it as of acknowledged authority in our own courts. If we could hold in this case—considering the nature of the property sold—that there was a constructive delivery; yet, under the statute of frauds, "the purchaser had the right, at the time and place, to repudiate the wood after delivery." And the auditor finds, distinctly, that the defendant, while the measurement was being done (an act provided for by the contract of sale), refused to take the wood upon the terms and conditions prescribed by the plaintiff; and the plaintiff, as distinctly, refused to let him have the wood upon the terms exacted by the defendant. It is not important which party was in the wrong. It is enough that the purchaser refused to "accept" the wood, to render the sale invalid under the statute of frauds.

The judgment, therefore, of the county court is reversed and judgment on the report for the defendant to recover his costs.

MELDRUM et al. v. SNOW.

(9 Pick. 441.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1830.

Replevin brought by the plaintiffs, who are brewers in the city of Boston, to recover of the defendant, a deputy of the sheriff of Suffolk, eighteen beer barrels, each containing about thirty gallons of beer, with their contents, being in the cellar recently occupied by one Klein, in Market street; which the plaintiffs aver to be their property, and that the defendant took and unlawfully detained the same on the 1st day of August, 1828.

The defendant pleaded as to the beer, that it was the property of Klein, and that he, the defendant, had attached it as such at the suit of Klein's creditors; to which the plaintiffs replied property in themselves, traversing Klein's ownership, and issue was joined thereon.

At the trial before Wilde, J., the plaintiffs proved that the beer was sent to Klein in the spring, he being a retailer of beer, and carrying on his business in the cellar where the beer was when it was attached by the defendant.

The plaintiffs also proved, that according to the universal usage of trade here, and in other places in this country, the following are the terms upon which retailers are supplied by the brewers. In the spring, the brewer sends to the retailer such quantity as the retailer expects to vend, and at a stipulated price, and in barrels belonging to the brewer, which are returned to him when emptied. The retailer pays for all that he vends in the course of the season, at the price at which it was originally furnished. If the beer becomes sour or stale, or is lost by the bursting of the casks, or by fire or other casualty, the loss falls on the brewer. If any beer remains unsold at the end of the season, the retailer has a right to return it to the brewer, but the brewer has no right to take it without his consent. Payment is never made by the retailer in advance, but usually in annual or semiannual settlements, when what has been sold is paid for and the residue is returned or remains a subject for future adjustment. The profits of retailing belong exclusively to the retailer, and all losses by bad debts fall upon him. The brewer's price of beer never varies. Beer cannot be drawn off nor removed in warm weather without injury and great danger of destroying it.

Sowden, a brewer in Boston, who has carried on the business for twenty-two years, testified, that he never considered the sale absolute till the barrel was emptied.

It was testified that the custom was observed by the plaintiffs in their dealings, and that Klein was one of their customers.

The plaintiffs also produced an instrument made and delivered to them by Klein on the first day of August, previously to the service of the writ, as follows: "Whereas I have always holden the beer, now in the cellar recently occupied by me, in the casks furnished by Meldrum & Co., as being of their property unless paid for, and the same being now attached by my creditors, ought of right according to our contract, to be delivered up to them; therefore and for good and valuable considerations me thereto moving, I do hereby assign and transfer all my right, title and property therein, unto the said Meldrum & Co., they crediting me in account for what they thus receive."

Horton, the attesting witness to the assignment, testified that he went with the plaintiffs' clerk to the defendant, and that the clerk produced this instrument and demanded the beer and barrels, but the defendant refused to give them up.

As to the question, whether the property in the beer was in Klein, the jury were instructed, that if they believed that he took the beer of the plaintiffs on the terms of the custom above stated, the property became vested in him; that this was in fact a conditional sale, and the beer could be attached as belonging to him, and the only remedy of the plaintiffs would be to recover of him the price.

The jury found a verdict for the defendant.

The plaintiffs moved for a new trial, because the judge instructed the jury, that the delivery of the beer, upon the terms of the custom proved, constituted a conditional sale to Klein, and vested in him the property in the beer, subject to attachment for his debts; whereas the plaintiffs contended, that such delivery vested only a special property in Klein for certain purposes; and that the general property remained in the plaintiffs; so that the beer could not be attached as the property of Klein; and that by virtue of the assignment to them of his special property, they became entitled to the immediate possession, and acquired the whole title, so that the detention by the defendant after demand made, was unlawful.

C. G. Loring and E. G. Loring, for plaintiffs. S. D. Ward, for defendant.

PER CURIAM. The principal question in the case regards the ownership of the beer. Evidence was given at the trial, of a custom among brewers to supply retailers with beer in the manner stated in the report of the judge. It is argued that this mode of dealing is necessary, and it should seem to be so; for in general the retailer would not be able to purchase a large quantity of beer at once, and it appears that beer must be supplied to him in cold weather, as it cannot be removed in warm weather without injury. The question is, whether the beer is liable to attachment as the property of the retailer. The contract is very similar to that of sale or return in England; and in the case of some kinds of manufactures such a contract is required, owing to particular circumstances

which take them out of the rules of ordinary sales. It is on this ground that contracts of sale or return are held valid; and it is uniformly considered that in such contracts the property continues in the original owner; except in cases under the statute of James, of bankruptcy, which is not in force in this commonwealth.

It is objected, that in the contract of sale or return, the article is to be returned, unless sold, but that by the custom under consideration, it may or may not be returned, at the election of the retailer. We are not clear that there is any such distinction; nor is there good reason for it. It is consistent with the English law, that the beer shall remain the property of the brewer until the election of the retailer shall be made.

We place this contract on the same ground as that of sale or return in England, and we are glad to find authorities which sustain us; but without authorities we should deem it proper to uphold such a contract. Retailers who take beer to sell are often persons of very small property, and the custom appears to be so general and well known, that the retailer would not be supposed to be the owner of the beer; no injury therefore can arise to creditors of the retailer. And it being beneficial to the community to introduce the use of beer, public policy would justify us in favouring the custom.

It is asked, how shall the beer be attached; whether as the property of the brewer, or of the retailer. It is not necessary for us to answer this question. There are many cases where chattels cannot be attached as the property either of the general or of the special owner.

An objection is raised in regard to the possession of the plaintiffs in replevin, the possession and the right of possession being here in the retailer. It is sufficient to remark, that when the sale of beer is stopped by the acts of the retailer, his right to retain ceases; and further, in the case before us, the general property being in the brewer, and the retailer having assigned all his right in the beer to him, the action may well lie.

New trial granted.

CUSHING et al. v. BREED et al.

(14 Allen, 376.)

Supreme Judicial Court of Massachusetts. Jan. Term, 1867.

Contract to recover the price of 500 bushels of oats sold and delivered. The answer admitted the sale and delivery of 105 bushels, and offered judgment for the price thereof, and denied the residue. It appeared that the plaintiffs were owners of a cargo of oats, which, on being weighed, was found to contain 6,695 bushels, and was stored in the Merchants' Grain Elevator in Boston, which belonged to persons whose business it was to receive, elevate, store, welgh, and deliver grain. The plaintiffs thereafter agreed to sell to the defendants 500 bushels thereof, and delivered to them the following order upon the proprietors of the elevator, dated June 23, 1864: "Please deliver Breed & Co., or order, 500 bushels of black oats from cargo, per schooner Seven Brothers, storage commencing, to the person or persons in whose favour this order is drawn, June 29, 1864." This order was presented on June 25, 1864, and accepted in the usual manner. The order was entered in the books, and on the same day 105 bushels of the oats were delivered to defendants, and before July 5, 1864, the whole cargo had been sold and delivered and removed from the elevator, exeept 1,274 bushels, which included the 305 bushels agreed to be sold to the defendants. On the 5th of July a fire oeeurred, which rendered the oats which remained in the elevator nearly worthless. It was the general usage of dealers in grain in Boston to place large quantities of grain in elevators, where the same remained until sold, by orders given to the purchaser, and after sueh sale it was removed from the elevator or kept therein, at the election of the purchaser. After the acceptance of such order by the proprietors of the elevator, the grain covered thereby was treated by them as the property of the purchaser; the vendor had no further control over it, but the proprietors held the same subject to the order of the purchaser, received orders from him in the same manner as from the original vendor, or weighed it out to him as he required, they guaranteeing to deliver out the full number of bushels weighed into the elevator, charging him with storage. Different cargoes of the same quality, belonging to different owners, were sometimes mingled in the bins. Grain so bought was paid for without regard to whether or not it had been separated and removed from the elevator, and all damage to grain so sold, from internal causes oeeurring after the delivery of the order, was borne by the purchaser. All the above usages were known to the defendants, but they objeeted to the evidenee to prove the same. The judge ruled that there was no such change of title to the grain, exeept as to the 105 bushels actually removed by the defendants from the elevator, as to make the defendants liable, and found that the plaintiffs were only entitled to recover the price agreed for the 105 bushels, with interest. The plaintiffs alleged exceptions.

W. Gaston and W. A. Field, for plaintiffs. C. B. Goodrich and I. J. Austin, for defendants.

CHAPMAN, J. The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the prineiples of the common law. The proprietors of the elevator are the agents of the various parties for whom they aet. When several parties have stored various parcels of grain in the elevator, and it is put into one mass, aecording to a usage to which they must be deemed to have assented, they are tenants in eommon of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in eommon. It is not neeessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property by the method above stated, or by any other method equivalent to it. Aetual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same, whether the proprietors are numerous or the vendor and vendee are owners of the whole. If the vendee resells the whole or a part of what he has purchased, his vendee may, by the same course of dealing, become also a tenant in common as to the part which he has bought.

This is not like the class of sales where the vendor retains the possession, because there is something further for him to do, such as measuring, or weighing, or marking, as in Scudder v. Worcester, 11 Cush. 573; nor like the case of Weld v. Cutler, 2 Gray, 195, where the whole of a pile of coal was delivered to the vendee in order that he might make the separation. But the property is in the hands of an agent; and the same person who was the agent of the ven-

dor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal. Hatch v. Bayley, 12 Cush. 27, and cases cited. The tenancy in common results from the method of storage which has been agreed upon, and supersedes the necessity of measuring, weighing, or separating the part sold.

No delivery is necessary to a tenant in common. Beaumont v. Crane, 14 Mass. 400.

Upon these principles, the plaintiffs are entitled to recover the amount due them for the property thus sold and delivered to the defendants. The damage occasioned to this property by the fire must be borne by the defendants, as owners of the property.

Exceptions sustained.

RHODE et al. v. THWAITES.

(6 Barn. & C. 388.)

Court of King's Bench. Hilary Term, 1827.

Declaration stated, that on the 3d December, 1825, the defendant bargained for and bought of the plaintiffs, and the plaintiffs, at the request of the defendant, sold to him certain goods, to wit, twenty hogsheads of sugar, at 56s. 6d. per cwt., to be delivered by the plaintiffs to the defendant upon request, and to be paid for at the expiration of two months then following; and in consideration thereof, and that the plaintiffs, at the like request of the defendant, had undertaken and faithfully promised the defendant to deliver the goods to him, he, the defendant undertook and faithfully promised the plaintiffs to accept the goods when he should be requested, and to pay them, the plaintiffs, for the same, at the expiration of the said credit. Averment, that the price of the goods amounted to a certain sum, to wit, &c., and that although the plaintiffs had always been ready and willing to deliver the goods to the defendant, and requested him to accept the same, and although the credit had expired, yet the defendant did not, nor would, at the time when he was so requested, or any time before or afterwards, accept the goods or pay the plaintiffs, or either of them, for the same, but refused so to do. There was then an indebitatus count for goods bargained and sold. The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry the plaintiffs proved that a contract for the sale of twenty hogsheads of sugar was made on the 3d of December, 1825, at 56s. 6d. per cwt., but there was no sufficient note in writing to satisfy the statute of frauds. On that day the plaintiff had in his warehouse on the floor, in bulk, a much larger quantity of sugar than would be required to fill up twenty hogsheads, but no part of it was in hogsheads. The defendant saw the sugar in this state in the plaintiffs' warehouse, and then made the contract in question. Four hogsheads were filled up and delivered to the defendant on the 10th of December, and a few days afterwards the plaintiffs filled up the remaining sixteen hogsheads, and gave notice to the defendant that they were ready, and required him to take them away; he said he would take them as soon as he could. They were not weighed till February, 1826, when the plaintiffs delivered a bill of parcels to the defendant. The plaintiffs added to the bulk, from time to time, as sales were made, and it did not very distinctly appear whether the sixteen hogsheads were filled wholly with the same sugar which was in the warehouse on the 3d of December when the contract was made. The four hogsheads which were first delivered were filled with that sugar. It was admitted that there was sufficient evidence of a sale of the four hogsheads, inasmuch as there was an acceptance of them by the defendant. No contract in writing sufficient to satisfy the statute of frauds having been proved, it was insisted that there was no evidence of any contract of sale of the sixteen hogsheads of sugar, and that the plaintiffs could only recover for the four hogsheads which had been actually delivered; but the jury, under the direction of the under sheriff, found a verdict for the value of the twenty hogsheads. A rule nisi for setting aside the writ of inquiry having been obtained by Hutchinson in Trinity term.

F. Pollock now showed cause. Mr. Hutchinson, contra.

BAYLEY, J. Where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods bargained and sold, until he has made that selection; but as soon as he appropriates part for the benefit of the vendee, the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price. Here there was a bargain, by which the defendant undertook to take twenty hogsheads of sugar, to be prepared or filled up by the plaintiffs. Four were delivered; as to them there is no question, but as to the sixteen it is said, that as there was no note or memorandum of a contract in writing sufficient to satisfy the statute of frauds, there was no valid sale of them; and that the plaintiffs in their declaration having stated their claim to arise, by virtue of a bargain and sale, cannot recover for more than the four hogsheads which were actually delivered to and accepted by the defendant; that in order to recover for the others they ought to have declared specially, that, in consideration that the plaintiffs would sell, the defendant promised to accept them. In answer to this, it is said, that there was an entire contract for twenty hogsheads, and that the defendant, by receiving four, had accepted part of the goods sold within the meaning of the seventeenth section of the statute of frauds. In fact, the plaintiffs did appropriate, for the benefit of the defendant, sixteen hogsheads of sugar, and they communicated to the defendant that they had so appropriated them, and desired him to take them away; and the latter adopted that act of the plaintiffs, and said he would send for them as soon as he could. I am of opinion, that by reason of that appropriation made by the plaintiffs, and assented to by the defendant, the property in the sixteen hogsheads of sugar passed to the vendee. That being so, the plaintiffs are entitled to recover the full value of the twenty hogsheads of sugar, under the count for goods bargained and sold. The rule for setting aside this writ of inquiry must therefore be discharged.

HOLROYD, J. The sugars agreed to be sold being part of a larger parcel, the vendors

were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant, and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant. That acceptance made the goods his own, subject to the vendors' lien as to the price. If the sugars had afterwards been destroyed by fire, the loss must have fallen on the defendant. I am of opinion that the selection of the sixteen hogsheads by the plaintiffs, and the adoption of that act by the defendant, converted that which before was a mere agreement to sell into an actual sale, and that the property in the sugars thereby passed to the defendant; and, consequently, that plaintiffs were entitled to recover to the value of the whole under the count for goods bargained and sold.

LITTLEDALE, J., concurred.

Rule discharged.

FIRST NAT. BANK OF CAIRO v. CROCKER et al.

(111 Mass. 163.)

Supreme Judicial Court of Massachusetts. Suffolk. Nov., 1872.

Tort against Crocker, Smith & Co. for the conversion of 100 barrels of flour. It appeared on the trial that Ayers & Co., of Cairo, Illinois, had dealt with defendant commission merchants in Boston for some years, shipping them flour on consignment, for sale in Boston, and having an open general consignment account with them. Ayers & Co., on August 23, 1870, consigned to them some flour, and drew on them for more than its value, writing them that they would make it all right in the next shipment. The defendants paid the draft, which left Ayers & Co. indebted to defendants for about $1,500. On August 24, 1870, Ayers & Co. shipped the 100 barrels of flour in dispute to Boston, taking a bill of lading "consigned to shipper's order Boston, Mass.," but on which was written "St. Louis Mills and Blackburn. For Crocker, Smith & Co., Boston, Mass." They then drew on defendants with bill of lading attached, and discounted the draft, which defendants refused to accept, and it was returned to defendants with the bill of lading. When the flour arrived in Boston, September 12, 1870, it was accompanied by a way bill, on which, under "Consignees," was written "Crocker, Smith & Co., Boston;" and the flour was received by them and sold, and applied to the account of Ayers & Co. September 14, 1870, Ayers & Co. drew a draft on account of the 100 barrels of flour on Goodwin, Locke & Co. of Boston, in favor of plaintiffs, and attached to it the bill of lading. The draft was accepted and paid when due. The bill of lading was indorsed in blank when delivered by Ayers & Co., but when forwarded by plaintiffs the words "Deliver within-named flour to Goodwin, Locke & Company, or order," were written over the indorsement of Ayers & Co.

A. Churchill and J. E. Hudson, for plaintiffs. A. A. Ranney, for defendants.

AMES, J. It is manifest that the flour was not placed in the hands of these defendants for the purpose of securing an existing debt, or indemnifying them for any advances that they had made. It was not consigned to them in order that it might be sold, and the proceeds carried to the credit of Ayers & Company in general account current. It is true that the consignors knew that they had overdrawn their account, and that they had expressly promised to "make it all right" at the next shipment. But that was an executory contract. The proposed correction stood wholly in agreement. A general promise to make the matter right was not of itself sufficient to vest in the defendants a title as absolute owners, even of the goods forwarded at the next shipment, unless the circumstances indicated, or at least were consistent with, such an intention on the part of the shippers. But in this case, the consignment and the draft constituted one transaction. The bill of lading and the draft came together; and the defendants understood that the flour was sent to them, subject to a claim of $500 in favor of the holder of the draft. They were to receive it upon the trust that they were to pay that amount out of the proceeds. The meaning of the transaction on the part of the shippers was that the defendants were to receive it for that purpose and upon that understanding only. It was as if they had said, "You may take this flour and sell it on our account, provided you will accept this draft." A bill of lading indorsed is only prima facie evidence of ownership, and is open to explanation. Pratt v. Parkman, 24 Pick. 42. This bill of lading was provisional, and was not intended to vest the property in the defendants, or to authorize their taking possession of it, except upon the condition of their acceptance of the draft. Allen v. Williams, 12 Pick. 297.

The act of the defendants, therefore, in taking possession of the flour was wholly unauthorized, and gave them neither valid title nor lawful possession. Allen v. Williams, ubi supra. In proceeding afterwards to sell it as if it were their own, and appropriating the proceeds, they were guilty of a wrongful conversion. A carrier may be a mere bailee for the consignor; and where by the terms of the bill of lading the goods are to be delivered to the consignor's order, the carrier is his agent, and not the consignee's. Moakes v. Nicolson, 19 C. B. (N. S.) 290; Baker v. Fuller, 21 Pick. 318; Merchants' Nat. Bank v. Bangs, 102 Mass. 291. On the refusal of the consignee to receive the goods upon the terms and for the purposes for which they were sent, he cannot take them for any other purpose. Shepherd v. Harrison, L. R. 5 H. L. 116; De Wolf v. Gardner, 12 Cush. 19, 23; Allen v. Williams, 12 Pick. 297. The title to the flour therefore remained in the shipper, wholly unaffected by the consignment. Even in the case of a contract of sale, the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary, is decisive to show his intention to preserve the jus disponendi, and to prevent the property from passing to the vendee. Wait v. Baker, 2 Exch. 1; Van Casteel v. Booker, Id. 691. The case of a mere consignment to an agent would be of course still stronger.

Upon the refusal of the defendants to accept the consignment upon the terms proposed, which refusal was sufficiently manifested by the protest of the draft and the return of the bill of lading, the owners of the flour, Ayers & Company, had a right to seek a new consignee, and to make another attempt to obtain an advance by a draft to be charged against the property. An arrangement was accordingly made with the plaintiffs, who discounted their draft of $400 upon the security of the same bill of lading that had been sent to the defendants and returned by them. If this bill

of lading was delivered to the plaintiffs, indorsed in blank by Ayers & Company, (and there is testimony to that effect,) the transaction would operate as a transfer of their title in the flour to the plaintiffs, if such were the intention of the parties. As the property was at that time in Boston, it was of course incapable of actual delivery at Cairo, and the delivery of the evidence of title, with the indorsement upon the bill of lading, was all that could be done for the transfer of the property from the general owner to the new purchaser; but it would be effectual for that purpose. Conard v. Atlantic Ins. Co., 1 Pet. 386, 445; Gibson v. Stevens, 8 How. 384; Bryans v. Nix, 4 M. & W. 775, 791; Low v. De Wolf, 8 Pick. 101; Gardner v. Howland, 2 Pick. 599; Stanton v. Small, 3 Sandf. 230; Pratt v. Parkman, 24 Pick. 42. In Gibson v. Stevens, the court say, per Taney, C. J.: "This rule applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery." To the extent of their advance of money upon the draft, therefore, the plaintiffs would be considered as purchasers, and they would acquire a special property in the flour for the purpose of protecting the draft. At the time of this transaction, the flour remained in the possession of the defendants, and, with the exception of taking possession, nothing had been done on their part amounting to a wrongful conversion of it to their own use. They had not put it out of their power to replace the shippers in the enjoyment of their rights.

It appears from the report, that, when the bill of lading was forwarded the second time, the name of the firm of Goodwin, Locke & Company was written over the indorsement of Ayers & Company. But we do not think that this fact, whether the blank indorsement were filled up after or before the discount of the draft, would materially affect the plaintiffs' rights. The bill of lading was attached to the draft, and the substance of the transaction was that the draft was discounted upon the security of the merchandise itself. It purports to be on account of the barrels of flour described in the bill of lading. The flour, although intrusted to Goodwin, Locke & Company to sell, was appropriated to the specific purpose of the payment of this draft. The bill of lading was put in the plaintiffs' hands to enable them to hold the merchandise as their security, and the discounting of the draft was the consideration for the transfer of the property to them. It was convenient so to indorse the bill of lading, as to make it manifest that Goodwin, Locke & Company were to receive and dispose of the goods; but they were to do so as trustees and agents of the plaintiffs, and not as proprietors in their own right. They certainly acquired no title in the property until they had accepted the draft, and when that event happened the goods had been disposed of by the defendants, and had gone into the hands of bona fide holders without notice, so as to be beyond recall. The effect of this transaction between the plaintiffs and Ayers & Company was that the flour was designated to stand as collateral security for the draft. If the draft had not been accepted, the plaintiffs clearly would not have lost their title to the flour. It is not necessary to hold that the plaintiffs became absolute owners of the property; it is enough that they had a right of property and possession to secure the payment of the draft, and the right of Ayers & Company as former owners of the specific property had become divested, leaving them only a right in the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds. De Wolf v. Gardner, 12 Cush. 19, has in many respects a close analogy with this case. There the general owner of the flour was the plaintiff, and the defendant was a party claiming under the new consignee, and the court held that the plaintiff had parted with the right of property, and could not maintain his action. In Bank of Rochester v. Jones, 4 N. Y. 497, as in the case at bar, the plaintiffs had discounted a draft drawn by the owner of a quantity of flour upon the defendant, who, as in the case at bar, refused to accept the draft, and claimed to hold the flour and sold it for the payment of a balance due from the drawer. Instead of a bill of lading, there had been a carrier's receipt, which the drawer delivered, unindorsed, to the plaintiff bank. The agreement was that the bank should hold the flour as security that the draft should be accepted, but with power to sell it if the draft should not be accepted. The court of appeals held that the defendant could not acquire any property in the flour, except by performance of the condition imposed, namely, the acceptance of the draft; that the transaction between the consignor and the plaintiff bank gave to the latter a general or special property in the flour; that the transaction constituted a sale to the bank in trust for the fulfillment of the agreement; that the carrier's receipt, though not indorsed, was sufficient evidence of the plaintiff's right of possession; and that the statute of frauds was not applicable, as the delivery of the receipt, in consideration of the discount of the draft, was sufficient to transfer the title. In legal effect, and for the purpose of explaining what is to be done with the merchandise, there can be no substantial difference between a bill of lading and a carrier's receipt.

We have then in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiffs; a delivery of the bill of lading in pursuance of that intent; and a valuable and executed consideration in the discounting of the draft. The fact that the goods were in the custody of the defendants would not prevent this arrangement from having the effect to transfer the title of Ayers & Company to the plaintiffs. Whipple v. Thayer, 16 Pick. 25; McKee v. Judd, 12 N. Y. 622. Whether it should be regarded as a sale, a pledge or a mort-

gage, there was a sufficient delivery to give to the plaintiffs a special property, which they could enforce by suit against any wrongdoer. They had a right to transfer the property, subject to the same trusts upon which they held it themselves, to their correspondent or agent in Boston, and it may well be that, if the draft had been accepted by Goodwin, Locke & Company before the flour had been sold and placed out of their reach, they would have been the proper parties to have brought this action. But the transfer to them for that reason wholly failed to take effect, and they acquired no title to the flour specifically. If they had accepted the draft before the flour had been sold to a bona fide purchaser, the case would have been almost exactly like Allen v. Williams, above cited. That was a case in which the consignee of merchandise refused to accept the draft which accompanied the bill of lading, and took possession of the merchandise, claiming as in this case the right to do so in order to secure a balance due to him from the consignor. The court held that a new consignee could maintain trover against him.

Our conclusion then is, that at the time of the sale of the flour by the defendants, the plaintiffs had a right and property in it, which, whether general or special, and whether as purchasers, trustees, pledgees or mortgagees, gave them a right of possession as against all wrongdoers; and that the defendants had no title whatever and were mere wrongdoers. The fact that the draft has been paid by the new consignees does not prevent the plaintiffs from maintaining the action for the benefit and protection of the acceptors of the draft, who without fault of their own have been deprived of the security upon which it was discounted.

Judgment for the plaintiffs.

MARVIN SAFE CO. v. NORTON.

(7 Atl. 418, 48 N. J. Law, 410.)

Supreme Court of New Jersey. Nov. 29, 1886.

On certiorari to Mercer common pleas.

On May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument: "May 1, 1884. Marvin Safe Company: Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars ($84.) seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said installments or notes, when same shall become due, then all of said installments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith. Samuel N. Schwartz. Mark: Samuel N. Schwartz, Hightstown, New Jersey. Route, New Jersey. Not accountable for damages after shipment." Schwartz paid the first installment of seven dollars, May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two installments of seven dollars each, by remittance to Philadelphia by check. Nothing more was paid. On July 30, 1884, Schwartz sold and delivered the safe to Norton for $55. Norton paid him the purchase money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe, and removed it to his office. Schwartz is insolvent, and has absconded. The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment on the ground that, the defendant having bought and paid for the safe bona fide, the title to the safe, by the law of Pennsylvania, was transferred to him.

Before Justices DEPUE, DIXON, and REED.

A. S. Appelget, for plaintiff in certiorari. S. M. Schanck, contra.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally; the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel, with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that state hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and bona fide purchasers from him; but that, upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser, or a bona fide purchaser from him. Clow v. Woods, 5 Serg. & R. 275; Enlow v. Klein, 79 Pa. St. 488; Haak v. Linderman, 64 Pa. St. 499; Stadtfeld v. Huntsman, 92 Pa. St. 53; Brunswick, etc., Co. v. Hoover, 95 Pa. St. 508; 1 Benj. Sales (Corbin's Ed.) § 446; 21 Am. Law Reg. (N. S.) 224, note to Lewis v. McCabe. In the most recent case in the supreme court of Pennsylvania, Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that, in default of such payment, the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but, as to creditors, the latter is good, while the former is invalid." Forrest v. Nelson, 19 Reporter, 38, 108 Pa. St. 481. The cases cited show that the Pennsylvania courts hold the same doctrine with respect to bona fide purchasers as to creditors.

In this state, and in nearly all of our sister states, conditional sales—that is, sales of personal property on credit, with delivery of possession to the purchaser, and a stipulation that the title shall remain in the vendor until the contract price is paid—have been held valid, not only against the immediate purchaser, but also against his creditors and bona fide purchasers from him, unless the vendor has conferred upon his vendee indicia of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in Cole v. Berry, 42 N. J. Law, 308; Midland R. Co. v. Hitchcock, 37 N. J. Eq. 550, 559; 1 Benj. Sales (Corbin's Ed.) §§ 437–460; 1 Smith, L. C. (8th Ed.) 33-90; 21 Am. Law Reg. (N. S.) 224, note to Lewis v. McCabe; 15 Am.

Law Rev. 380, "Conversion by Purchase." The doctrine of the courts of Pennsylvania is founded upon the doctrine of Twyne's Case, 3 Coke, 80, and Edwards v. Harben, 2 Term R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud,—a doctrine repudiated quite generally by the courts of this country, and especially in this state. Runyon v. Groshon, 12 N. J. Eq. 86; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Miller v. Pancoast, 29 N. J. Law, 256. The doctrine of the Pennsylvania courts is disapproved by the American editors of Smith's Leading Cases in the note to Twyne's Case, 1 Smith, Lead. Cas. (8th Ed.) 33, 34; and by Mr. Landreth in his note to Lewis v. McCabe, 21 Am. Law Reg. (N. S.) 224; but, nevertheless, the supreme court of that state, in the latest case on the subject,—Forrest v. Nelson, decided February 16, 1885,—has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that, upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him bona fide by a levy under execution or a bona fide purchase, will acquire a better title than the original purchaser had,—a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction, it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. Leonard v. Davis, 1 Black, 476; 1 Benj. Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract, was thereupon complete.

The validity, construction, and legal effect of a contract may depend, either upon the law of the place where it is made, or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but, when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. Frazier v. Fredericks, 24 N. J. Law, 162; Dacosta v. Davis, Id. 319; Bulkley v. Hanold, 19 How. 390; Scudder v. Union Nat. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102; Morgan v. New Orleans, M. & T. R. Co., 2 Woods, 214, Fed. Cas. No. 9,801; Simpson v. Fogo, 9 Jur. (N. S.) 403; Whart. Confl. Laws, §§ 341, 345, 401, 403, 418; Parr v. Brady, 37 N. J. Law, 201. The contract between Schwartz and the company having been made and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that state the condition expressed in the contract of sale, that the safe company should not relinquish title until the contract price was paid, and that on the failure to pay any of the installments of the price the company might resume possession of the property, was valid, as between Schwartz and the company. By his contract, Schwartz obtained possession of the safe, and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs, the safe was brought into this state, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe, was made at Hightstown, in this state. The property was then in this state, and the contract of purchase was executed by delivery of possession in this state. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this state. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this state. By the law of this state, Norton, by his purchase, acquired only the title of his vendor,—only such title as the vendor had when the property was brought into this state and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that, therefore, his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a bona fide purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company, Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue

of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts, that a reservation of title in the vendor upon a conditional sale is void as against creditors and bona fide purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that state. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud, and a forfeiture of the vendor's reserved title as in favor of creditors and bona fide purchasers. The doctrine is founded upon consideration of public policy adopted in that state, and applies to the fact of possession and acts of ownership under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract.

In MacCabe v. Blymyre, 9 Phila. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid, though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the state where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that state; that the mortgagee, by allowing the mortgagor to retain possession of the property, and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right, under the mortgage, as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that state. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another state, as against a bona fide purchaser who had bought the property of the mortgagor in this state, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this state. Parr v. Brady, 37 N. J. Law, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand, the safe was removed to this state by Schwartz as soon as he became the purchaser. His possession, under the contract, has been exclusively in this state. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that state; nor the public policy of this state, for in this state possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this state, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this state; for by the law of Pennsylvania creditors and bona fide purchasers are put upon the same footing. Neither on principle, nor on considerations of convenience or public policy, can such a right be conceded. Under such a condition of the law, confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this state, would depend, not upon our laws, but upon the laws and public policy of sister states or foreign countries. A purchaser of chattels in this state which his vendor had obtained in New York, or in most of our sister states, under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the state of Pennsylvania. Whatever might impair that title—the continued possession and exercise of acts of ownership over it by Schwartz, and the purchase by Norton—occurred in this state. The legal effect and consequences of those acts must be adjudged by the law of this state. By the law of this state it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this state, Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which by our law will give him a better title.

The judgment should be reversed.

DEXTER v. NORTON et al.

(47 N. Y. 62.)

Court of Appeals of New York. 1871.

Action for damages for breach of a contract to sell and deliver cotton. The opinion states the facts. Judgment for defendant dismissing the complaint.

James C. Carter, for appellant. Wm. W. McFarlane, for respondents.

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the one hundred and sixty-one bales in question by the sellers before delivery. The title therefore did not pass to the vendee, but remained in the vendor. Joyce v. Adams, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is, that he might have provided against them by his contract. Paradine v. Jane, Aleyn, 27; Harmony v. Bingham, 12 N. Y. 99; Tompkins v. Dudley, 25 N. Y. 272.

But there are a variety of cases where the courts have implied a condition to the contract itself, the effect of which was to relieve the party when the performance had without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. Cutter v. Powell, 2 Smith, Lead. Cas. 50.

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." Benj. Sales, 424. In replevin for a horse and judgment of retorno habendo, the death of the horse was held a good plea in an action upon the bond. Carpenter v. Stevens, 12 Wend. 589. In Taylor v. Caldwell, 3 Best & S. 836, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned. Held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In School District v. Dauchy, 25 Conn. 530, the defendant had agreed to build a schoolhouse by the 1st of May, and had it nearly completed on the 27th of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract; and this is the rule of the civil law. Poth. Cont. Sale, art. 4, § 1, p. 31. We were referred to no authority against this rule. But the learned counsel for the

appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, is to recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER, and RAPALLO, JJ., concur. PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.

DORR v. FISHER.

(1 Cush. 271.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1848.

This was an action to recover the price of two tubs of butter. The plaintiff having been allowed, against objection on the part of the defendant, to prove his claim as a book account, the defendant then introduced evidence that in November, 1845, he offered several kegs of butter to the defendant for sale. On examining the butter, (two or three kegs only,) the defendant told the plaintiff that he was unable to decide whether it was good or not, but that he wanted it of a first-rate quality. The plaintiff then said that he called the butter first-rate, and the defendant replied that, if it was good, the plaintiff might leave him two tubs. The two tubs were left at the defendant's store, where they remained for about a week, when the plaintiff came to the store, and some conversation ensued relative to the butter. The plaintiff was there again some time afterwards and requested that the butter should be put into the cellar. The principal question was as to the quality of the butter, and the evidence upon this point was conflicting. The defendant contended that the butter was sold under a warranty that it was of the best quality, and that the burden of proof was on the plaintiff to prove that it was of such a quality. Judge instructed the jury that if the butter were sold with a warranty as to quality, or with a representation amounting to a warranty, the burden of proof was on the defendant to show that it was not equal to the warranty or representation. The jury returned a verdict against the defendant, who thereupon filed exceptions.

T. Willey, for plaintiff. T. Wentworth, for defendant.

SHAW, C. J. This cause has been argued, on the part of the defendant, as if the suit were brought upon an open, unexecuted contract for the purchase of goods; whereas the declaration is in indebitatus assumpsit for goods sold and delivered. To maintain this action, it is not necessary to set out the contract of sale, with its conditions and limitations; it is enough to prove an agreement for a sale of the goods, at a fixed price in money, or without a price, (in which case, the law implies an agreement to pay so much as they are worth,) and an actual delivery, whereby a debt arises. A delivery by the vendor implies an acceptance by the vendee. An offer, by the vendor, not accepted by the vendee, may be a good tender, and a good performance on his part, but it is not a delivery. If there are conditions annexed to the agreement of sale, respecting the quality, or other circumstances, which are not complied with by the vendor, the vendee should decline to accept the goods; but, if he does accept them, the acceptance is a waiver. And so, in an indebitatus assumpsit, for goods sold and delivered, the plaintiff must prove a delivery, or he will fail in the action. And this is not confined to the case of an implied assumpsit, on a quantum valebat; if the sale be made by an express contract, not under seal, and the goods are actually delivered, it is sufficient to allege that the defendant is indebted to the plaintiff for goods sold and delivered, and the law implies a promise to pay. No matter, therefore, what may have been the terms and conditions, under which goods are sold and delivered; if nothing remain but the obligation to pay for them, this is a debt, the existence of which supports the allegation of being indebted, and supersedes the necessity of setting out specially such terms and conditions.

"Where goods have been sold and actually delivered to the defendant, though under a special agreement, it is in general sufficient to declare on the indebitatus count, provided the contract were to pay in money, and the credit be expired." 1 Chit. Pl. 338.

This is not a mere technical rule of pleading, but a sound rule of law and justice, growing out of the nature of a sale. Were it otherwise, and were the plaintiff, after a delivery of goods on a contract of sale, bound to prove the terms and conditions of such sale, and to prove affirmatively that he had complied with those conditions, on his part, the result would be, that the vendee, having accepted the goods, as and for the goods contracted for, and without offering to return them, or giving notice to the vendor, to come and take them back, might hold and retain the goods, without paying any thing for them. The vendor could not recover them back in an action, because he has delivered them to the vendee, in pursuance of a contract, as his own.

It is asked, then, has the vendee no remedy against the vendor, after delivery, if the vendee fails to derive the benefits, expected and stipulated for on the sale? Certainly not. If he has been deceived, as to the title, quality, or character of the thing purchased, he may rescind the contract, restore or tender back the goods, and recover back the purchase money; or he may be secured by a warranty on the sale. The law, on the sale of personal property, implies a warranty of good title, so that if the vendee be deprived of his purchase by a paramount title, he has a remedy on his warranty. Or he may take an express warranty, as to the quality, condition, value, age, origin, or other circumstances respecting the thing sold. But a warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for

the existence or truth of some fact, relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action.

But, to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do every thing in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover. Conner v. Henderson, 15 Mass. 319; Kimball v. Cunningham, 4 Mass. 502; Perley v. Balch, 23 Pick. 283. Such a restoration of the goods, and of all other benefits derived from the sale, is a direct condition, without a compliance with which, the vendee cannot rescind the contract, and recover back the money or other property, paid or delivered on the contract.

But his other remedy is by an action on the warranty, or contract of the vendor, on which, if there be a breach, he will recover damages to the amount of the loss sustained by the breach, whatever that may be. If it be a warranty of the quality of goods, and the breach alleged is, that the goods delivered were inferior to the goods stipulated for, the damage will ordinarily be the difference in value between the one and the other. Such an action affirms instead of disaffirming the contract of sale, leaves the property in the vendee, and gives damages for the breach of such separate, collateral contract of warranty.

This remedy is so familiar, that it scarcely requires to be supported and explained by authorities. But it naturally requires an action to be brought by the vendee against the vendor, which, if the vendor is at the same time suing for the price, is a cross action.

But the general tendency of modern judicial decisions has been, to avoid circuity and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence by way of defence, instead of requiring a cross action, when it can be done without a violation of principle, or great inconvenience in practice.

And it has lately been decided, in this court, after consideration and upon a review of the authorities, that, when a cross action will lie for a deceit in the sale of a chattel, the deceit may be given in evidence in reduction of the damages, in a suit for the purchase money. Harrington v. Stratton, 22 Pick. 510. And the principles, which govern that case, are precisely applicable to the case, where a cross action will lie to recover damages on a breach of warranty on a sale, and the same may be given in evidence, and a like amount deducted from the purchase money, in assessing damages in a suit by the vendor for the price. Poulton v. Lattimore, 9 B. & C. 259; Perley v. Balch, 23 Pick. 283.

It appears by the report in the present case, that these are the principles on which the trial of the action proceeded. The plaintiff must first have proved a sale and delivery of the two tubs of butter. Some objection was made to the plaintiff's account book; but it was not alluded to in the argument. Indeed, the other proof tends to show, that the defendant agreed to take the two tubs of butter, and directed the plaintiff to leave them at his store, which the plaintiff did the same day. No offer was made afterwards to return the butter. No notice was given to the defendant to take it away. This was evidence, from which a jury might well infer a sale and delivery. The only way, then, in which the defendant could avail himself of proof of warranty of quality, and a breach of it, was in obtaining a reduction of damages, by way of set-off, in nature of a cross action, and as a substitute therefor. Had the defendant brought his action, it is quite clear, that the burden of proof would have been on him to prove such warranty and breach, and the damage sustained by it. The burden was on him in the same manner, when he resorted to this line of defence, as a substitute for a cross action. We are of opinion, therefore, that the direction of the judge was strictly correct, that if the article was sold to the defendant with a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof was on the defendant, to show that it was not equal to the warranty.

Exceptions overruled and judgment on the verdict.

GOULD v. BOURGEOIS.

(18 Atl. Rep. 64, 51 N. J. Law, 361.)

Supreme Court of New Jersey. June 17, 1889.

Rule to show cause.

Error to circuit court, Atlantic county; before Justice REED.

Argued at February Term, 1889, before BEASLEY, Chief Justice, and Justices DEPUE, VAN SYCKEL, and KNAPP.

Leaming & Black, for the rule. *D. J. Pancoast, contra.*

DEPUE, J. This suit was upon a promissory note made by the defendant. The defense was the want or failure of consideration. The city council of Holly Beach City proposed to build a breakwater. The defendant was an applicant for a contract to do the work, and prepared and sent to the city council an agreement with the city to that effect. Members of the city council sent word to the defendant that the city had already entered into a contract for the building of the breakwater with Gould & Downs, that these parties could not fulfill their contract, and that, if the defendant would make a satisfactory arrangement with Gould & Downs, the city would give him the contract. The parties thereupon entered into negotiation, the conclusion of which was a contract in writing and under seal, whereby Gould & Downs, for the consideration of a note for $375 and $500 in city bonds, assigned to the defendant "all our right, title, and interest in a certain contract entered into by the authorities of Holly Beach City and ourselves to build a certain breakwater ordered built by a resolution passed April 14, 1887." Subsequently, the city council, having obtained the opinion of counsel that the city had no power to build the breakwater, refused to ratify the arrangement of the defendant with Gould & Downs, and abandoned the project of constructing the work. The note sued on was given in compliance with the terms of this assignment. There was no proof of an express warranty by Gould & Downs of the validity of their contract, nor any evidence from which fraud, either in representation or concealment on their part, could be inferred. The power of the city to make the contract was not mooted until after these parties had concluded their arrangement and the assignment had been made; and, if the contract was invalid, its invalidity arose from the city charter,—a public act equally within the knowledge of both parties. The defendant's contention was that, inasmuch as there was a sale of the contract, a warranty that the contract was a valid contract was implied, and that, the contract being *ultra vires* on the part of the city, and void, the consideration entirely failed. If the proposition on which the defense was rested be sound in law, the defense was appropriate in this suit. The doctrine of implied warranty of title in the sale of goods applies as well to the sale of a chose in action, and extends not merely to the paper on which the chose in action is written, but embraces also the validity of the right purported to be transferred. Wood v. Sheldon, 42 N. J. Law, 421. Nor is there anything in the nature of the alleged infirmity of the contract that would bar the defense. In the ordinary case of a suit on a breach of warranty of title the validity of the vendor's title against the adverse claimant is triable, if the purchaser has in fact lost title, although the transactions which determine the vendor's title are *res inter alios acta*. If the contract which was the subject-matter of the assignment was in fact *ultra vires*, a foundation was laid for this defense, the city having repudiated the contract *in limine* on that ground.

The validity of the defense offered and overruled depends upon the fundamental proposition whether, under the circumstances of this sale, a warranty of title is implied in law. The theory on which a warranty of title is implied upon the sale of personal property is that the act of selling is an affirmation of title. The earlier English cases, of which Medina v. Stoughton, 1 Salk. 210, 1 Ld. Raym. 593, is a type, adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person; annexing a warranty of title to the former, and excluding it in the latter. In the celebrated case of Pasley v. Freeman, 3 Term R. 51, BULLER, J., repudiated this distinction. Speaking of Medina v. Stoughton, this learned judge said that the distinction did not appear in the report of the case by Lord Raymond, and he adds: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." Nevertheless the English courts continue to recognize the distinction, with its incidents, as adopted in Medina v. Stoughton, to some extent, at least so far as to annex the incident of an implied warranty of title on a sale by a vendor in possession. Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. Mr. Benjamin, in his Treatise on Sales, after a full examination and discussion of the late English cases, states the rule in force in England at this time in the following terms: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." 2 Benj. Sales, (Corbin's Ed.) §§ 945-961. In this country the distinction between sales

where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized; but the tendency of later decisions is against the recognition of such a distinction, and favorable to the modern English rule. Id. § 962, note 21. Bid. War. §§ 246, 247. The American editor of the ninth edition of Smith's Leading Cases, in the note to Chandelor v. Lopus, after citing the cases in this country which have held that the rule of *caveat emptor* applies to sales where the vendor is out of possession, remarks that in most of them what was said on that point was *obiter dicta*, and observes "that there seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it." 1 Smith, Lead. Cas. (Edson's Ed.) 344. In Wood v. Sheldon, supra, Chief Justice BEASLEY, in delivering the opinion of the court, adopted, in terms, the rule stated by Mr. Benjamin, and made it the foundation of decision. The precise question now under discussion did not then arise. In Eichholz v. Bannister, 17 C. B. (N. S.) 708 721, ERLE, C. J., said: "I consider it to be clear upon the ancient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract; and that if he is not the owner his contract is broken. * * * In almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale." In that case it was held that on the sale of goods in an open shop or warehouse, in the ordinary course of business, a warranty of title was implied; but there is a line of English cases holding that, where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied. In this proposition the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction. Thus in Morley v. Attenborough, 3 Exch. 500, the holding was that on a sale by a pawnbroker at public auction of goods pledged to him in the way of business there was no implied warranty of absolute title, the undertaking of the vendor being only that the subject of the sale was a pledge, and irredeemable by the pledgeor. In Chapman v. Speller, 14 Q. B. 621, the defendant bought goods at a sheriff's sale for £18. The plaintiff, who was present at the sheriff's sale, bought of the defendant his bargain for £23. The plaintiff was afterwards forced to give up the goods to the real owner. He then sued the defendant, alleging a warranty of title. The court held that there was no implied warranty of title nor failure of consideration; that the plaintiff paid the defendant, not for the goods, but for the right, title, and interest the latter had acquired by his purchase, and that this consideration had not failed. In Bagueley v. Hawley, L. R. 2 C. P. 625, a like decision was made, where the defendant resold to the plaintiff a boiler the former had bought at a sale under a distress for poor-rates, the plaintiff having knowledge at the time of his purchase that the defendant had bought it at such sale. In Hall v. Conder, 2 C. B. (N. S.) 22, the plaintiff, by an agreement in writing by which, after reciting that he had invented a method of preventing boiler explosions, and had obtained a patent therefor within the United Kingdom, transferred to the defendant "the one-half of the English patent" for a consideration to be paid. In a suit to recover the consideration the defendant pleaded that the invention was wholly worthless, and of no public utility or advantage whatever, and that the plaintiff was not the true and first inventor thereof. On demurrer the plea was held bad, for that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent, such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. A like decision was made in Smith v. Neale, 2 C. B. (N. S.) 67.

Chief Justice ERLE, in his opinion in Eichholz v. Bannister, describes Morley v. Attenborough, Chapman v. Speller, and Hall v. Conder, as belonging to the class of cases where the conduct of the seller expresses, at the time of the contract, that he merely contracts to sell such title as he himself has in the thing. The opinion is valuable, in that, while it rescues the common-law rule of implied warranty of title from the assaults of distinguished judges who held that *caveat emptor* applied to sales in all cases, and that in the absence of express warranty or fraud the purchaser was remediless, it also placed the rule under the just limitation that it should not apply where the circumstances showed that the sale purported to be only a transfer of the vendor's title. Expressions such as "if a man sells goods as his own, and the title is deficient, he is liable to make good the loss," (2 Bl. Comm. 451,) or "if he sells as his own, and not as the agent of another, and for a fair price, he is understood to warrant the title," (2 Kent, Comm. 478,)—as a statement of the principle on which the doctrine of implied warranty of title rests, is not inconsistent with the principle adopted by Chief Justice ERLE. Stating the principle in the negative form adopted in Morley v. Attenborough, that there is no undertaking by the vendor for title unless there be an express warranty of title, or an equivalent to it

by declaration or conduct, affects only the order of proof. It was conceded in that case that the pawnbroker selling his goods undertook that they had been pledged, and were irredeemable by the pledgeor, and if it be assumed, as I think it must be, that the act of selling amounts to an affirmation of title of some sort, but that its force and effect may be explained, qualified, or entirely overcome by the facts and circumstances connected with the transaction, the difference between Morley v. Attenborough and Eichholz v. Bannister will rarely be of any pratical importance.

The limitation above mentioned upon the doctrine that the act of selling is an affirmation of title has been adopted in this state. In Bogert v. Chrystie, 24 N. J. Law, 57–60, this court held that the general rule that the vendor of goods having possession, and selling them as his own, is bound in law to warrant the title to the vendee, did not apply where the vendor sells with notice of an outstanding interest in a third party, and subject to that interest. In Hoagland v. Hall, 38 N. J. Law, 351, the vendor agreed in writing to assign a lease he held upon certain premises, and to sell and transfer goods and chattels mentioned in a schedule. The premises were a licensed inn and tavern, and in the schedule of the articles sold were enumerated "the licenses of the house." The law under which the license was granted prohibited the transfer of a license, and in the purchaser's hands it would be void and valueless. The court held that that circumstance did not justify the purchaser in withdrawing from his contract; that there was no warranty by the vendor that the license, when assigned, would be of any value to the purchaser; and that the latter, having obtained by the assignment what he had bargained for, could not annul his contract unless he showed fraud or misrepresentation with respect to the subject-matter of the contract. In Bank v. Trust Co., 123 Mass. 330, the defendant had a contract with B., pledging to him certain tobacco, in which it was recited that the tobacco was B.'s own property, and free from all incumbrances, and made an assignment to the plaintiff "of all his right, title, and interest in and under the contract, with all the property therein mentioned." The tobacco was then in the defendant's possession, and was delivered by him to the plaintiff. Afterwards a third person demanded and recovered of the plaintiff part of the tobacco as his property, which had been pledged to the defendant without right. The plaintiff then sued the defendant on an alleged implied warranty of title. The court ruled adversely to the plaintiff's claim. In the opinion the court said that the written assignment did not purport to be a sale of the goods, but of all the defendant's right under the contract, and its obvious purpose was to substitute the plaintiff in the place of the original pledgee, and that the fact that at the time of the transfer to the plaintiff the goods were in the actual possession of the defendant did not vary the case.

In the case in hand the circumstances connected with the assignment, independent of the words "all our right, title, and interest," etc., contained in it, preclude the implication of a warranty of the validity of the contract. Taken in connection with the words of the assignment, the intention of the parties is free from doubt.

The contention that the plaintiff was in fault in that he made no delivery of the contract to the defendant is without substance. The contract was neither produced at the negotiation between the parties, nor was it required. The transaction was the purchase of Gould & Downs' interest to consummate an arrangement whereby those parties were to be got rid of, that the city might give the defendant a contract. The defendant obtained by the assignment all he bargained for. The defense was properly overruled, and the rule to show cause should be discharged.

MOORE v. McKINLAY et al.

(5 Cal. 471.)

Supreme Court of California. Oct. Term, 1855.

Appeal from the district court of the twelfth judicial district, San Francisco county.

Hoge & Wilson, and Cook & Olds, for appellants. Charles H. S. Williams, for respondent.

MURRAY, C. J. This was an action in the court below, to recover the amount paid by the plaintiff to the defendants for the purchase of an invoice of garden seeds.

It is in evidence, that after the arrival of the vessel, the plaintiffs were requested to open and inspect the seeds, but declined to do so, and paid for them. They were afterwards tested, and found to be almost wholly worthless. In order to maintain this action, the plaintiffs must show either an express or implied warranty. The sale note is as follows: "We have this day sold you two shipments of seeds for arrival," &c.

The plaintiff maintains, that the word "seeds" thus used, amounts to an express warranty; that it has an express signification, importing an article which will germinate or grow, and that it would be error to apply this term to any seeds not possessing these properties. And second, that if not an express warranty, the law will imply a warranty; or, in other words, raise the presumption, that the article sold is merchantable, and fit for the use for which it was sold.

At common law, the rule caveat emptor applied to all sales of personal property, except where the vendor gave an express warranty, which is said to be such recommendations or affirmations, at the time of the sale, as are supposed to have induced the purchase. To constitute a warranty, no precise words are necessary; it will be sufficient if the intention clearly appear.

During the time of Lord Holt, the doctrine was established, that to warrant, no formal words were necessary, and therefore a warranty might be implied, from the nature and circumstances of the case, and the maxim was thus introduced, that a sound price imports a sound bargain or warranty.

This doctrine was afterwards exploded by Lord Mansfield, since which time it has undergone some modifications in the English and American courts, tending in the former somewhat and in some of the states of the Union, to the rule of civil law, which implies that the goods sold are merchantable, and fit for the purpose for which they were bought.

The better opinion, however, I think, as deduced from English and American decisions, is that a warranty will not be implied, except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use.

In Hart v. Wright, 17 Wend., 267, Judge Cowen reviews the former decisions of that state as well as the English cases, and arrives at the conclusion which I have stated. This case was afterwards brought before the court of errors of New York, and the doctrine approved.

In Moses v. Mead, 1 Denio, 385, the question again came before the supreme court of New York. In commenting on the decisions on this subject, Judge Bronson says, "Some English judges have lately shown a strong tendency towards the doctrines of the civil law, in relation to sales, and have been disposed to imply warranties where none exist. * * * I do not regret to find, that there are men in Great Britain who can look beyond the shores of that island; but I feel no disposition to follow them in their new zeal for the civil law, for the reason, that it is not our law in relation to sales in the best."

The same doctrine is maintained in Fraley v. Bispham, 10 Pa. St. 320, and many other American decisions. There have been no departures from this rule in the decisions of this court. In the case of Flint v. Lyon, 4 Cal. 17, the flour was described as "Haxall," and we held, that this amounted to a warranty, that the article sold was "Haxall," and not a different brand or quality of flour. In Ruiz v. Norton, 4 Cal., 359, the sale note described the rice as "sound rice," which it was held amounted to a warranty.

Testing the present case by the rule which we have deduced from the better authority of courts, the plaintiff cannot recover. The language used in the sale note cannot be tortured into a warranty, and the fact that the plaintiff had an opportunity and declined to inspect the seeds before accepting them, takes the case from the operation of the rule of implied warranty.

Judgment reversed, with costs.

HEYDENFELDT, J., concurred.

SINCLAIR v. HATHAWAY.

(23 N. W. 459, 57 Mich. 60.)

Supreme Court of Michigan. May 13, 1885.

Error to Wayne; Jennison, Judge.

Chapman & Smith, for appellant. Robert Laidlaw, for appellee.

CAMPBELL, J. Plaintiff sued defendant for a balance claimed to be due for bread. Defendant claimed that the account had been balanced by bad bread returned, and by a sum of $10 paid in settlement of accounts. Plaintiff was a baker, and defendant's business was to supply bread to customers about the city. It appears that for a period defendant was employed by plaintiff to sell his bread, and make returns and pay for the bread furnished daily. Defendant claims that on several occasions the bread furnished was bad and unwholesome, and that he returned it to a sufficient extent to overbalance his payments, and that there was an understanding to that effect. The parties are directly at variance on the facts. There was a good deal of testimony showing that bread was often made unfit for use, and that plaintiff had to sell it for feeding animals. He swore there was never any such thing. The court below rightly excluded evidence of a Sunday contract before the business was entered into. But there was testimony of subsequent dealings tending to prove the theory of the defense.

The case being an appeal from a justice, it was shown and seems to have been admitted that in the justice's court plaintiff swore that the amount due him was only $65, while in the circuit he swore to $103.79, and recovered it. The court was asked to charge the jury that if plaintiff so swore below, and so changed his testimony without explaining why, that circumstance should weigh with the jury against the good faith of the claim. The court refused so to charge, but in the charge the court made this remark: "Defendant also states that the complainant only claimed $65 in justice court, but the complainant undertakes to explain it by saying that he made a mistake, as he did not have his books of account with him at the time." This had a decided tendency to induce the jury to regard the point as of no consequence. But it is not a small matter for a person who goes into court to swear to his claim, to pay so little regard to his oath as to take no pains to find out what is due. And beyond this, there is nothing in the plaintiff's testimony to show any such explanation given by him on oath. The error was material.

The court also refused to charge that plaintiff was subject by law to an implied warranty that the bread was wholesome, and in the charge stated the defendant's objections to apply chiefly to its marketable quality, and to its being soiled externally by getting dirty on the floor. There was, however, testimony from several sources that the bread was unfit for food, apart from its external appearance. It was held in Hoover v. Peters, 18 Mich. 51, that there is an implied warranty of wholesomeness in the sale of provisions for direct consumption. This question is not discussed in plaintiff's brief, and was left entirely out of view by the court, and the only reference to it was in connection with an express contract.

In this case defendant was, as plaintiff claims, in his employ as a peddler, bound to pay for his bread, at a discount, and his connection with the sales brings the case within the same principle. Defendant cannot be treated as a purchaser from a wholesale dealer of articles sold in the market for purposes of commerce. Bread is an article sold for immediate consumption, and never enters into commerce, and as one of the prime necessaries of life is of no use unless it is good for food. Defendant, as a mere middle-man between the baker and the consumer, and acting in his employment, had a right to expect bad bread to be made good, and the court should have so held. Mere externals he could see for himself, but bad quality would not always be detected without such a minute examination as the circumstances of such a business would render it difficult to make.

The judgment must be reversed, and a new trial granted.

The other justices concurred.

FIELDER v. STARKIN.

(1 H. Bl. 17.)

Court of Common Pleas, Trinity Term, 1788.

This was an action on the warranty of a mare, "that she was sound, quiet, and free from vice and blemish."

Plea, non-assumpsit, on which issue was joined.—

The cause came on to be tried at the last assizes at Thetford, before Mr. Justice Ashhurst, and a verdict found for the plaintiff. It appeared on the trial, from the learned judge's report, that the plaintiff had bought the mare in question of the defendant at Winnel fair, in the month of March, 1787, for 30 guineas, and that the defendant warranted her sound, and free from vice and blemish.—Soon after the sale, the plaintiff discovered that she was unsound and vicious (a), but kept her three months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, the plaintiff kept her till the month of October 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound a full twelve-month before her death. It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstances of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

Adair, Serjt., shewed cause. Le Blanc, Serjt., in support of the rule.

Lord LOUGHBOROUGH—Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price. In the present case it appears from the evidence of the farriers who saw the mare opened, that she must have been unsound at the time of the sale to the plaintiff.

GOULD, J.—Of the same opinion, remembered many cases of express warranty, where a return was not held to be necessary.

HEATH, J.—If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

WILSON, J.—Of the same opinion, recollected a cause tried before Mr. Justice Buller at nisi prius, where the defendant had sold the plaintiff a pair of coach horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice Buller held that the action on the warranty might be supported without a return.[1] As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

Rule discharged.

[1] See Towers v. Barrett, 1 Term R. p. 136, and Buchanan v. Parnshaw, 2 Term R. 745.

BLOXAM et al. v. SANDERS et al.

(4 Barn. & C. 941.)

King's Bench, Michaelmas Term, 1825.

Trover to recover the value of a quantity of hops from the defendants. At the trial before Abbott C. J. at the London sittings, after last Trinity term, the jury found a verdict for the plaintiffs, damages £3000, subject to the opinion of this court upon the following case: The plaintiffs were assignees of J. R. Saxby, a bankrupt under a commission of bankrupt duly issued against him on the 5th January 1824. The act of bankruptcy was committed on the 1st November 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of Southwark. Previous to his bankruptcy the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23d August purchased from the defendants the hops (among others) for which this action was brought. Bought notes were delivered in the following form: "Mr. John Robert Saxby, of Sanders, Parkes, and Co. T. M. Simmons, eight pockets at 155s. 8th August 1823." Part of the hops were weighed, and an account of the weights was delivered to Saxby by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him in which he was made debtor for six different parcels of hops, the amount of which was £739. The usual time of payment in the trade was the second Saturday subsequent to a purchase. Part of the hops belonged to the defendants, and part they sold as factors, but they sold all in their own names, it being the custom in the hop trade to do so. It was proved that the bankrupt had said more than once that the hops were to remain in the defendants' hands till paid for, and that he said so when he was about buying one of the parcels of hops for which the action was brought. The bankrupt did not pay for the hops, and on the 6th September 1823 the defendants wrote to the bankrupt, and desired him to "take notice, that unless he paid for the hops they had sold him, on or before Tuesday then next, the defendants would proceed to resell them, holding him accountable for any loss which might arise in consequence thereof." Before the bankruptcy the defendants did not sell any parcel of hops without the bankrupt's express assent. After the notice already stated the defendants sold some parcels of the hops, but in one instance the bankrupt refused to allow the defendants to sell a parcel of hops to a person named by them at the price offered, and that parcel was accordingly sold by the defendants, before Saxby's bankruptcy, to another person by Saxby's authority. On another occasion in the month of September the bankrupt had employed a broker to sell another parcel of the hops, but the defendants refused to deliver them without being paid for them. After the act of bankruptcy the defendants sold hops of the bankrupt's to the amount of £380 19s. 5d. The defendants delivered account sales of the hops so sold by them after the bankruptcy. The hops were stated to be sold for Saxby, and he was charged warehouse rent from the 30th of August, and also commission on the sales. Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them (as factors), of which fifteen pockets were sold on and after the 13th of January 1824 of the value of £77 19s. 5d., and of which four remained in their warehouse at the time of the trial, which four were of the value of £14, and there were also unsold of the hops purchased from defendants seven bags, fifty-six pockets, of the value of £251 13s. 6d. There was a demand by plaintiffs of these hops, and a tender of warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before action brought. The jury found that the defendants did not rescind the sales made by them to the bankrupt. This case was argued at the sittings before last term, by

Evans, for the plaintiffs. Abraham, contra.

BAYLEY, J., now delivered the judgment of the court. This was an action of trover for certain quantities of hops sold by the defendants to Saxby before his bankruptcy, and for certain other hops which Saxby had placed in defendants' warehouses that defendants in their character of factors might sell them for his use, and the question as to this latter parcel stands upon perfectly distinct grounds from the question as to the others. This parcel consisted of nineteen pockets; defendants sold none of them until after Saxby's bankruptcy, and then they sold fifteen pockets, not for the use of the assignees, but to apply the proceeds, not for any debt due to them in their character of factors, but to discharge a claim they considered themselves as having upon Saxby in regard to the other hops; and the other four pockets they refused to deliver to the assignees. It was candidly admitted upon the argument, and was clear beyond all doubt, that the defendants were not warranted in applying the proceeds of the fifteen pockets to the purpose to which they attempted to apply them, and that they had no legal ground for withholding the four pockets; and, therefore, to the extent of these nineteen pockets, the value of which is £91 19s. 5d., we think it clear that the plaintiffs are entitled to recover. The other quantities were hops Saxby had bargained to buy of the defendants on different days in August 1823, and for which defendants had delivered bought notes to Saxby. The bought notes were in this form: "Mr. J. R. Saxby, of Sanders, Parkes, and Co., T. M. Simmons, eight pockets at 155s., 8th August 1823." Part of the hops were

weighed, and an account delivered to Saxby of the weights, and samples were given to Saxby and invoices delivered. The bought notes were silent as to the time for delivering the hops, and also as to the time for paying for them, but the usual time for paying for hops was proved to be the second Saturday after the purchase. It was also proved that Saxby had said that the hops were to remain with the defendants till they were paid for; but as the admissibility of such evidence was questioned, and in our view of the case it is unnecessary to decide that point, I only mention it to dismiss it. (The learned judge then stated the other facts set out in the special case, and then proceeded as follows.) Under these circumstances the question is, whether in respect of these hops the plaintiffs are entitled to recover. It was urged, on the part of the plaintiffs, that the sale of these hops vested the property in them in Saxby; that the hops were to be considered as sold upon credit, and that defendants had no lien therefore upon any of them for the price; that if they ever had any lien, it was destroyed as to those they sold by the act of sale, and that the plaintiffs were entitled to recover the full value of what were sold, without making any deduction for the price which was unpaid. It is, therefore, material to consider whether the property vested in Saxby to any and to what extent; and what were the respective rights of Saxby and of the defendants. Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The buyer's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. Tooke v. Hollingsworth, 5 T. R. 215. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear, Hanson v. Meyer, 6 East, 614. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them in transitu, Mason v. Lickbarrow, 1 H. Bl. 357; Ellis v. Hunt, 3 T. R. 464; Hodgson v. Loy, 7 T. R. 440; Inglis v. Usherwood, 1 East, 515; Bohtlingk v. Inglis, 3 East, 381. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, a fortiori, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights. Gordon v. Harper, 7 T. R. 9. Trover is an action of that description, it requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. Indeed that charge was not made until after the bankruptcy, and until the defendants insisted that the right of possession was transferred to their second vendee. Then as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price. As that price has not been paid or tendered, we are of opinion that this action, which is not an action for special damage by a wrongful sale, but an action of trover, cannot, as to those hops, be maintained. The verdict must, therefore, be for the plaintiffs for the sum of £91. 19s. 5d. only.

Judgment for the plaintiffs.

WOOD v. MANLEY.

(11 Adol. & E. 34.)

Court of Queen's Bench. Michaelmas Term, 1839.

Trespass for breaking and entering plaintiff's close. Plea, (besides others not material here,) as to entering the close, that defendant, before the time when, &c., was lawfully possessed of a large quantity of hay, which was upon plaintiff's close, in which, &c., and that defendant, at the times when, &c., by leave and license of the plaintiff to him for that purpose first given and granted, peaceably entered the close, to carry off the said hay and did then and there peaceably take his said hay from and ont of the said close, as he lawfully, &c., which are the said alleged trespasses, &c. Replication, de injuria.

On the trial, before Erskine, J., at the last Somersetshire assizes, it appeared that the plaintiff was tenant of a farm, including the locus in quo; and that, his landlord having distrained on him for rent, the goods seized, comprehending the hay mentioned in the plea, were sold on the premises; the conditions of the sale being, that the purchasers might let the hay remain on the premises till the Ladyday following, (1838,) and enter on the premises in the meanwhile, as often as they pleased, to remove it. The defendant purchased the hay at the sale: and evidence was given to show that the plaintiff was a party to these conditions. After the sale, on 26th January, 1838, plaintiff served upon defendant a written notice not to enter or commit any trespass on his, the plaintiff's, premises. In February following, defendant served plaintiff with a written demand to deliver up the hay, or to suffer him, defendant, to have access thereto and carry it away; threatening an action in default thereof. The plaintiff, however, locked up the gate leading to the locus in quo, where the hay was; and the defendant, on 1st March, 1838, broke the gate open, entered the close, and carried away the hay. The learned judge told the jury that, if the plaintiff assented to the conditions of sale at the time of the sale, this amounted to a license to enter and take the goods, which license was not revocable: and he therefore directed them to find on this issue for the defendant, if they thought the plaintiff had so assented. Verdict for the defendant.

Crowder now moved for a new trial, on the ground of misdirection. The learned judge appears to have considered that this case fell within the principle laid down in Winter v. Brockwell, 8 East, 308, that a license executed cannot be revoked. There the execution of the license took place by the defendant building in pursuance of the plaintiff's permission; so that the defendant had incurred an expense, upon the faith of the license, in doing the very thing which was licensed: and the action was for the thing so done. But this is not the case of a license executed before revocation: the plaintiff revoked the permission before the defendant acted upon it at all. On these pleadings, the only question is, whether the act done by the plaintiff was licensed by the defendant. It may be that the defendant was entitled to bring trover, or perhaps to sue for breach of the conditions: but the license was revoked before it was executed. [Lord DENMAN, C. J. If a man buys a loaf, and part of the bargain is, that he shall leave it at the baker's shop, and call for it, can the baker prevent his entering the shop to take the loaf?] Suppose a party agrees to sell merchandise; if he afterwards refuse to sell, the buyer cannot take it. [Lord DENMAN, C. J. But here the sale was completed.] The ruling of the learned judge, if correct, would show that every case of contract created an irrevocable license. [Lord DENMAN, C. J. Here the question is on the fact of the license.] The revocation of a license need not be specially replied: it may be shown under a traverse of the license. Besides, the replication here puts the whole plea in issue; and the plea alleges a quiet entry, which is negatived by the gate being broken. A right of way may, perhaps, in some cases be enforced by violence, but not a license. [PATTESON, J., referred to Tayler v. Waters, 7 Taunt. 384, (2 E. C. L. 405.)] The question there was, whether a license to use real property could be given without writing; and it was decided that it could. Liggins v. Inge, 7 Bing. 682, (20 E. C. L. 304,) [1] is to the same effect.

Lord DENMAN, C. J. Mr. Crowder's argument goes this length;—that, if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a license thus given and acted upon is irrevocable.

PATTESON, J. Tayler v. Waters, 7 Taunt. 374, (2 E. C. L. 405,) shows that a license to use a seat at the opera-house, paid for and acted upon by sitting there, cannot be countermanded. Here the conditions of sale, to which the plaintiff is a party, are, that any one who buys shall be at liberty to enter and take. A person does buy; part of his understanding is that he is to be allowed to enter and take. The license is therefore so far executed as to be irrevocable equally with that in Tayler v. Waters. The case put by Mr. Crowder is different. I do not say that a mere purchase will give a license: but here the license is part of the very contract.

[1] See Bridges v. Blanchard, 1 A. & E. 536, (28 E. C. L. R. 43.)

WILLIAMS, J. The plaintiff, having assented to the terms of the contract, puts himself into a situation from which he could not withdraw.

COLERIDGE, J. The pleadings raise the issue whether, when the act complained of was done, the leave and license existed: it did exist if it was irrevocable; and I think it was irrevocable. Although no one of the cases referred to is exactly the same as this, yet all proceed on the principle that a man, who, by consenting to certain terms, induces another to do an act, shall not afterwards withdraw from those terms.

Rule refused.

PAUL v. REED et al.

(52 N. H. 136.)

Supreme Judicial Court of New Hampshire. Sullivan. June, 1872.

Action by Azor Paul against Dexter G. Reed, defendant, and Dana R. Moody, trustee. The trustee was held liable on the disclosure, and defendant took exceptions. Exceptions sustained.

The disclosure of Moody, the trustee, showed that he succeeded defendant, Reed, as tenant of a boarding house, and when he was taking possession, and Reed was moving out, he agreed to purchase from Reed a hog, some sugar, and other articles. The agreed price of the articles was as follows: One hog, $10.50; flour, $7; butter, $10; bedstead, $1; sugar and salt, $1.80. Reed made a memorandum of the articles with the price carried out, and, as he was adding it up, the sheriff served the trustee summons on Moody. The hog had already been removed by Moody to another pen, and the sugar had been placed with Moody's other sugar. When the summons was served, Moody held the money in his hand, ready to pay for the articles as soon as the amount was ascertained. After service of process, Reed asked Moody to give the articles up, saying, "We can call it no sale, and I can take my stuff," giving as a reason that they were not yet paid for. Moody replied that he would take counsel, and, if it was safe for him to do so, he would give them up. He was advised to let the matter stand, as there would be a question as to his liability to be tried. Defendant, Reed, claimed the property, but the court held Moody to be chargeable with the $30.30, and defendant excepted, and the question was reserved.

Mr. Bowers, for plaintiff. S. H. Edes, for defendant and trustee.

BELLOWS, C. J. Unless the principal defendant had another hog and other provisions or fuel, so that the value of his provisions and fuel exceeded twenty dollars, all the articles sold to the trustee were exempt from attachment. As there is no proof that he had another hog, or more provisions, or fuel, the court cannot find that he had such; and, therefore, unless the title in these goods had vested in the trustee so that he became indebted for them, the trustee must be discharged.

The question then is, whether the goods were delivered so as to vest the title in the trustee.

The proof tends to show that the sale was for cash, and not on credit;—so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated. 2 Kent, Comm. *496, *497; Story, Cont. § 796; Noy's Maxims, 87; Insurance Co. v. De Wolf, 2 Cow. 105. The case, then, stands before us as a contract of sale for cash on delivery: in such case the delivery and payment are to be concurrent acts; and therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer. The seller, may, to be sure, waive the payment of the price, and agree to postpone it to a future day, and proceed to complete the delivery; in which case it would be absolute, and the title would vest in the buyer. But in order to have this effect, it must appear that the goods were put into the buyer's possession with the intention of vesting the title in him.

If, however, the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to perform the contract as to entitle the seller to put an end to it and reclaim the goods.

This is not only eminently just, but it is in accordance with the great current of authorities, which treat the delivery, under such circumstances, as conditional upon the immediate payment of the price. 2 Kent, Comm. *497; Chit. Cont. (9th Am. Ed.) *350, note 1, and cases; Story, Cont. §§ 796, 804; Palmer v. Hand, 13 Johns. 434; Marston v. Baldwin, 17 Mass. 605; Leven v. Smith, 1 Denio, 573, and cases cited. So the doctrine was fully recognized in Russell v. Minor, 22 Wend. 659, where, on the sale of paper, it was agreed that the buyer should give his notes for it on delivery, and the delivery was in several parcels. On delivery of the first, the seller asked for a note; but the buyer answered that he would give his note for the whole when the remainder was delivered, and the parcel now delivered could remain until then. When the rest was delivered, the defendant refused to give his note; and the court held that the delivery of all the goods was conditional, and that the seller might maintain replevin for all the goods. The general doctrine is fully recognized in this state in Luey v. Bundy, 9 N. H. 298, and more especially in Ferguson v. Clifford, 37 N. H. 86, where it is laid down that if the delivery takes place when payment is expected simultaneously therewith, it is in law made upon the condition precedent that the price shall forthwith be paid. If this condition be not performed, the delivery is inoperative to pass the title to the property, and it may be instantly reclaimed by the vendor.

The question then is, whether the delivery here was absolute, intending to pass the title to the vendee and trust him for the price, or, whether it was made with the expectation that the cash would be paid immediately on the delivery. This is a question of fact, but it is submitted to the court for decision. Ordinarily it should be passed upon at the trial term; but where the question is a mixed one of law and fact, as it is here, it may not be irregular, if the judge thinks it best, to reserve the entire

question for the whole court. Assuming that the questions both of law and fact are reserved, we find that the goods were sold for cash, and of course that the delivery of the goods and the payment of the price were to be simultaneous, and accordingly, when a part had been delivered, and the seller was figuring up the amount, and the buyer had taken out his money to pay the price, the act was arrested by the service of this process.

The evidence relied upon to prove the delivery to be absolute and intended to pass the title at all events, is simply and solely the changing of the hog into another pen, and mixing the sugar with other sugar of the buyer. Without this mixing of the sugar, the case would be just the ordinary one of a delivery of the goods with the expectation that the buyer would at once pay the price; and we think that circumstance is not enough to show a purpose to make the delivery absolute, but rather a confident expectation that the buyer would do as he had agreed, and pay the price at once. The case of Henderson v. Lauck, 21 Pa. St. 359, was very much like this. There was a sale of corn, to be paid for on the delivery of the last load; and as the loads were delivered, the corn was placed in a heap with other corn of the buyer, in the presence of both parties. On the delivery of the last lot the buyer failed to pay, and the seller gave notice that he claimed the corn, and brought replevin, which was held to lie,—the court regarding the delivery as conditional, and the plaintiff in no fault for the intermingling of the corn. It is very clear that the intermingling of the sugar does not, as matter of law, make the delivery absolute: and I think, as matter of fact, it is not sufficient to prove an intention to pass the title absolutely. When the buyer declined to pay the price, the seller at once reclaimed the goods, and so notified the buyer, who did not object to giving up the sale if he could safely do so.

In respect to the question now before us, it is not material for what reason the buyer declined to pay for the goods, although the service of the trustee process might shield him from damages in a suit by the seller for not taking and paying for the goods. For the purposes of this question, it is enough that the buyer did not pay the price, and thus gave the seller a right to reclaim the goods, which he did at once. The goods themselves were exempt from attachment; and the fact that the trustee process was designed to intercept the price of those goods, could not affect his right to reclaim them when the buyer declined to pay the price.

The exception must therefore be sustained, and the

Trustee discharged.

STEDMAN v. GOOCH.

(1 Esp. 4.)

Court of King's Bench. May 14, 1793.

This was an action of assumpsit for goods sold and delivered: the defendant pleaded 1st, The general issue. 2dly, Coverture. Upon the first plea issue was joined; and to the second was a replication, "That at the time of the cause of action accrued, the defendant lived separate and apart from her husband, and had from him a separate maintenance." Upon which plea another issue was taken.

The defence relied upon on the general issue by the defendant was, that the plaintiff in discharge of her bill, which was for millinery goods furnished to the defendant, had taken three promissory notes of one Finlay, payable at the house of a Mr. Browne, and had given the defendant a receipt to that effect.

Lord KENYON was of opinion that it then became incumbent on the plaintiff to prove, 1st, that she had used due diligence to get the money from Finlay; and 2dly, that he, after notice, had made default in the payment.

To shew that she had used due diligence to get the money from Finlay, the plaintiff proved that she had sent Finlay's notes to Browne, where they were made payable, and that he had been applied to respecting the payment: that in answer to that application he had said that he knew Finlay, but that he had no effects of his in his hands; nor could he pay them unless he had.

Mingay, for the defendant, objected: That these declarations of Browne were not evidence of Finlay's default; that they were not bills drawn upon him, which he was bound to pay, but that he was only mentioned, as his house was the place where the notes were to be paid.

Lord KENYON said, that it was the constant practice to make country bank bills and notes payable at certain houses in London; and though the persons at whose houses they were payable were not parties to them, nor personally liable, yet that an answer at such houses as to the payment or nonpayment of the bills or notes made payable there was sufficient. He therefore held Browne's declarations to be admissible evidence of the probable nonpayment of the notes in question.

To prove notice to this effect to Finlay, the plaintiff called a witness, who proved that she carried a letter from the plaintiff to Finlay, inclosing the notes, and informing him that they were returned as not being likely to be paid: that she went to the house where Finlay lodged, for the purpose of delivering the letter to him; that she enquired for him from the woman who kept the house, and was informed that he was not at home; that she then left the letter inclosing the notes with this woman, and that the next morning the letter and bills were thrown into the plaintiff's house by some persons unknown. His lordship was of opinion that this was sufficiently presumptive proof that the letter had come to Finlay's hands, and therefore allowed it to be read. It was to the effect stated by the witness.

It was then objected by the counsel for the defendant, that it appeared that these notes had been returned before they were payable; and that the plaintiff, having taken them in discharge of her debt, for goods sold, could not maintain an action on her original debt for the goods, until an actual default in the payment of these notes given in discharge of it, as the notes might be paid when they became due; nor should the plaintiff be allowed to judge of the probable or improbable ability of the party to pay at a future day.

Lord KENYON overruled the objection. He said that to this effect the law was clear, that if in payment of a debt the creditor is content to take a bill or note payable at a future day, that he cannot legally commence an action on his original debt, until such bill or note become payable, or default is made in the payment; but that if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it.

In proof of the issue arising on the second plea, "that the defendant lived separate and apart from her husband, and had from him a separate maintenance," Erskine, for the plaintiff, stated, that the evidence he had to that effect was, first, a sentence of the ecclesiastical court, by which the defendant and her husband were separated; and secondly, as to the separate maintenance, that he would prove that she received from her husband a regular annuity of £200 per ann., payable at a banking house in London. To prove the separation, he produced and proved the sentence of the spiritual court, by which a divorce a mensa & toro was pronounced between the parties.

Mingay objected to this, and observed that the production of the sentence alone was not sufficient evidence; that the libel and all the proceedings in that court should likewise have been produced.

Lord KENYON seemed disposed to be of opinion that the sentence alone was sufficient, but reserved the point.

In proof of the separate maintenance, the plaintiff called the clerk of Messrs. ——'s banking house. He swore that that house, by the direction and on the account of Mr. Gooch, the husband of the defendant, paid her £200 per annum quarterly. He was asked if this payment was made in consequence of Mr. Gooch's verbal directions, or if the witness knew of any deed by which the payment of that sum was secured to her. He answered, that he knew of no such deed. Upon which Mingay objected: that this evidence was insufficient to support this part of the issue; that in this action the wife was to be charged

as a feme sole; that a feme covert had been so charged, by reason of her separate maintenance being properly subject to no control from the husband, but exclusively her own; that in the present case what was paid to the defendant might be a mere gratuity revokable at pleasure, and not a property independent of the husband, by reason of which only she could be charged with her own debts; that in all cases of separate maintenance which had come before the court, the husband had secured by the intervention of trustees a separate maintenance to his wife, by which means only she could take from him a separate and independent property. He therefore relied, that as no deed appeared in this case, that the defendant could not be deemed to have a separate maintenance in law as should subject her to the payment of her own debts.

Lord KENYON was of opinion that it was necessary that the separate maintenance should be secured by deed; but as the point had never been expressly decided, his lordship reserved it.

Mr. Erskine and Mr. Marryatt, for plaintiff. Mr. Mingay, for defendant.

In the next term the two points so reserved came on before the court, when the other judges seemed to concur in opinion with Lord KENYON; but no judgment has been given.[1]

[1] But see the case of Marshall v. Rutton, since determined, in B. R. 8 Term R. 545.

PERLEY v. BALCH.

(23 Pick. 283.)

Supreme Judicial Court of Massachusetts. Essex. Nov. Term, 1839.

Assumpsit on a promissory note. At the trial in the court of common pleas, before Williams, J., the defendant introduced evidence tending to prove, that the consideration of the note was the sale of an ox by the plaintiff to the defendant, with a warranty, that the ox would fatten as well as any one the defendant then had; that one eye of the ox, which was then apparently defective and diseased, was falsely and fraudulently represented by the plaintiff to have been hooked out, whereas, in fact, it had been destroyed by a cancer; and that this disease was incurable, and rendered the ox incapable of being fattened and entirely worthless for any other purpose.

It did not appear, that the defendant had returned or offered to return the ox to the plaintiff, or had ever notified to the plaintiff, that he was dissatisfied with the contract, until after the commencement of this action, which was several years after the sale. The defendant kept the ox in his pasture, &c., for several months, and was at some trouble to ascertain whether it would answer his purpose. It did not appear what became of the ox afterwards.

The defendant also offered evidence tending to show, that he purchased the ox for the sole purpose of fattening it, and that this was known to the plaintiff at the time of the sale; and he contended, that, upon these facts, there was an implied warranty on the part of the plaintiff, that the ox should be reasonably fit for that purpose.

The judge instructed the jury, that no such implied warranty arose from these facts; that if they were satisfied that the plaintiff warranted, that the ox would fatten as well as any one which the defendant then had, and that the warranty was false, or if they were satisfied, that the plaintiff falsely and fraudulently represented the eye of the ox to have been hooked out, whereby the defendant was induced to purchase it, and if they were further satisfied, that the ox, if it had been returned to the plaintiff in a reasonable time, would have been of no pecuniary value to him, the defendant would be entitled to a verdict; but that, otherwise, their verdict should be for the plaintiff.

The jury returned a verdict for the plaintiff, and the defendant excepted to the instructions to the jury.

Mr. Lord, for plaintiff. Mr. Perkins, for defendant.

MORTON, J. The instruction, that there was no implied warranty, is not now complained of, and is undoubtedly correct. See Emerson v. Brigham, 10 Mass. 197; Shepherd v. Temple, 3 N. H. 455. Every sale of chattels contains an implied warranty, that the property of them is in the vendor. But it is well settled by authority as a general rule, that no warranty of the quality, is implied from the sale. The maxim, caveat emptor, governs. 2 Kent, Comm. 478; Chit. Cont. 133; Champion v. Short, 1 Camp. 53; Bragg v. Cole, 6 Moore, 114; Stuart v. Wilkins, 1 Doug. 20; Parkinson v. Lee, 2 East, 314; Mockbee v. Gardner, 2 Har. & G. 176.

But the learned justice of the common pleas further instructed the jury that if there was a fraud in the sale, or an express warranty and a breach of it, in either case, the defendant might avoid the contract, by returning the ox within a reasonable time; or, if the ox would have been of no value to the plaintiff, then without returning him. Whether the jury found their verdict upon the ground, that no fraud or express warranty was proved, or that the ox was of no value, does not appear. If therefore any part of the instructions was incorrect, the defendant is entitled to a new trial.

Where the purchaser is induced by the fraudulent misrepresentations of the seller, to make the purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and recover back the consideration paid, or, if he has given a note, resist the payment of it. Here was no return of the property purchased, but if that property was of no value, whether there was any fraud or not, the note would be nudum pactum. The defendant's counsel, not controverting the general rule, objects to the qualification of it. He says, that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract, although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the promisor. If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss.

But it is apparent, that a want of consideration was not the principal ground of defence. The defendant mainly relied upon fraud or a warranty. And to render either available to avoid the note, it was indispensable, that the property should be returned. He cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified in toto, or not at all. It cannot be enforced in part and rescinded in part. And, if the property would be of any

benefit to the seller, he is equally bound to return it. He who would rescind a contract, must put the other party in as good a situation as he was before; otherwise he cannot do it. Chit. Cont. 276; Hunt v. Silk, 5 East, 449; Conner v. Henderson, 15 Mass. 319.

The facts relied upon by the defendant to defeat the note, might, if proved, be used in mitigation of damages. If there was a partial failure of consideration, or deception in the quality and value of it, or a breach of warranty, the defendant may avail himself of it to reduce the damages to the worth of the chattels sold, and need not resort to an action for deceit, or upon the warranty. Chit. Cont. 140; Germaine v. Burton, 3 Starkie, 32; Basten v. Butter, 7 East, 480; Poulton v. Lattimore, 9 Barn. & C. 259; Bayley, Bills (2d Am. Ed.) 531, and cases cited. But he is not bound to do this. He may prefer to bring a separate action, and he has an election to do so. The present judgment will not bar such an action. But however this may be, it does not appear, that any instructions were given or refused upon this point. The value of the property to the defendant would have been the true rule of damages. And had he desired it, doubtless, such instructions would have been given. But as he did not request them, he cannot complain of their omission.

Judgment of the court of common pleas affirmed.

GUION et ux. v. DOHERTY.

(43 Miss. 538.)

Supreme Court of Mississippi. Oct., 1871.

Error to the circuit court, Yazoo county; Campbell, Judge.

Hudson & Nye, for plaintiffs in error. Wilkinson & Bowman, for defendant in error.

SIMRALL, J. Patrick M. Doherty, survivor of the mercantile copartnership of P. O'Donnell & Co., sued John O. Guion and Mary, his wife, in assumpsit. The object of the suit was to reach the separate property of the wife, and subject it to the indebtedness to the plaintiff. The declaration contains several counts: (1) On a promissory note made by John O. Guion, given, as averred, for sundry necessaries for the benefit of the family, and separate estate of the wife; (2) on an account stated; (3) for plantation and family supplies, sold and delivered; (4) for similar supplies furnished in 1863. Pleas: (1) Non assumpsit; (2) that the plaintiff agreed to accept Confederate bonds or treasury notes, but now declined to do so; (3) by Mrs. Guion, coverture; (4) by Mrs. Guion, that the goods were sold and delivered to John O. Guion on his sole credit, the plaintiff knowing that she had a separate estate, and with no intention to charge the same to her or her estate; (5) that plaintiff knew that she had separate property, and allowed her husband, as agent, to appropriate its proceeds to the support of the family, etc., and, knowing this, gave him, and not her or her property, the credit, she being feme covert. Notice was attached that defendant would offer proof that the goods were sold at Confederate prices, and to be paid for in that currency. To the second, third, fourth, and fifth pleas the plaintiff demurred, which was sustained to all except the fourth and fifth, to which there were replications. The jury found for plaintiff, whereupon a motion was made for a new trial, which was refused.

Sundry errors are complained of, growing out of the rulings on the pleadings, the instructions to the jury, and the refusal to grant a new trial. The demurrer to the second plea was properly sustained. The plea sets up an agreement to take Confederate and other depreciated currency, and that defendant, as soon as it could be obtained, in pursuance of the agreement, got and presented to the plaintiff Confederate bonds or currency, which he refused and still refuses to take. Treated as a plea of accord and satisfaction, it is imperfect. Whilst it avers the accord, it does not show satisfaction. An accord, to constitute a bar, must be full, perfect, and complete. Peytoe's Case, 9 Reports, 79; Lynn v. Bruce, 2 H. Bl. 317; Balston v. Baxter, Cro. Eliz. 304. If accord is relied on, it must be executed. 3 Bl. Comm. 15. Chief Justice Eyre, in Lynn v. Bruce, said: "Accord, executed, is satisfaction; accord, executory, is only substituting one cause of action in the room of another, which might go on to any extent." In Allen v. Harris, 1 Ld. Raym. 122, the judge declared the "contrary doctrine would overthrow all the books." Also, 1 Bac. Abr. 58; Russell v. Lyles, 6 Wend. 391; Clark v. Dinsmore, 5 N. H. 139.

Nor is the plea sufficient as a tender. The allegation that "the defendant had the same in readiness and presentation for payment," etc., is not enough. If the thing is capable of being brought into court as a specie, bank notes, etc., the plea must be accompanied with the thing originally tendered. To complete the transaction, the tender must be made, and the party must be semper paratus to pay if called on, and must repeat the tender with his plea.

3. Nor is the plea of coverture a bar to the action. The contracts set out in the second, third, and fourth counts of the declaration are such as a wife who has a separate estate can make.

4. There was no error in not applying the demurrer to the declaration. The argument addressed to us could have no effect, except, perhaps, as to the first count. But there were three good counts, and the rule is, if there be a demurrer to the entire declaration, and one count be good, the demurrer is not well taken.

5. The instructions granted at the instance of the plaintiff clearly inform the jury what contracts a wife, having a separate estate, may make, so as to be obligatory on her and her property; and conclude with the direction that the jury must look to all the facts in evidence to determine to whom the credit was given, and to whom the plaintiff looked for payment.

For Mrs. Guion, the court charged the jury to the effect that if Mr. Guion bought the goods on his own credit, and gave his individual note for them, then they must find for her, although part or all the goods were for her benefit, her children, and property. The jury must be satisfied that the credit was originally given to the wife, and that the plaintiff treated with and looked to her for payment. The wife is not liable for necessaries, unless she expressly contracted for and consented thereto, or gave her express consent to be charged therewith, and the credit was given to her at the time. The duty of the husband is to provide for the support of his family, and the wife is not bound, unless she contracted for the same on her own credit, and with her consent was charged therewith, at the time. The jury are the sole judges whether the credit was given to the husband or the wife.

Thirty-odd instructions were proposed for Mrs. Guion, nearly all of them granted in the words selected by counsel. The central idea in most of them was, to whom was the credit given,—to the husband or to the wife?

The purpose of the charges of the court is to instruct the jury in the law applicable to the case. Whether this can be done better by presenting the same, or nearly the same, ideas, in various forms of language, is exceedingly doubtful. It might tend to embarrass and confuse the minds of nonprofessional men, as are jurors, rather than to convey to them a clear comprehension of the rules of law to be applied to the facts proved. The jury could hardly have failed to see that the point of the defense was that, although Mrs. Guion owned separate property, yet, if the goods were taken up for family supplies, or for the use of her property, she was not responsible, unless they were bought with her consent, and on her credit.

6. The only remaining question is, does the testimony prove or tend to prove that the goods were for the use of the wife's plantation, and of herself and family, and were they sold on her credit? In reviewing the verdict of the jury, according to repeated decisions of this court, we will not consider the testimony with the view of determining whether our judgment would concur with the jury, but only to see whether there was sufficient evidence fairly to support the verdict. If there be conflict between the witnesses, the jury were in more favorable circumstances to elicit the truth than this court. The testimony was that the wife owned a plantation, used in the cultivation of cotton; that the plaintiffs were the merchants by whom the business was done, the husband being the active manager. The business was continued through several years, the crops of cotton being delivered to the plaintiffs, and the proceeds applied as credits on the accounts.

P. W. Doherty, plaintiff, describes the transactions thus: John O. Guion had no property, and was engaged in no business from which he realized an income. The goods sold to him were solely on the credit of his wife's separate property. The husband owned nothing. From the beginning of the business, the accounts made by Guion were paid and settled by his wife's cotton, sent to plaintiffs for sale or shipment, and the proceeds placed to credit of the accounts. The purchase of supplies, and the shipment and sale of Mrs. Guion's cotton, was done through the husband. Neither husband nor wife ever complained of this mode of doing the business. Plaintiff kept accounts with the husbands of a great many wives who had separate estates, just as the accounts were kept with Mr. Guion. In all such cases the credit was given on the faith of the wife's property. Plaintiffs knew that Guion had no property. The credit was given on account of the wife and her property. No credit could have been given to the husband. In payment of taxes on wife's property, the receipts were taken in the name of the husband.

John O. Guion, defendant, deposed that he supposed credit was given to himself. Never mentioned anything about wife's separate property. Never told plaintiffs he was agent for his wife. His wife never formally made purchases, nor gave any orders. She never authorized witness to buy anything on credit. He bought all supplies on his credit, and paid for them out of the proceeds of wife's crops. Owned no land. Had, when married, carriage and horses, and some money, etc. Never owned any other property after the marriage. Had no other business than to attend to his wife's plantation. Shipped her cotton, and drew drafts in his name. All this was done with her knowledge and consent, etc.

Aside from the other testimony, a jury might well conclude from this witness' statement that he had his wife's consent to buy on credit and pay with her means. It would not be a strained inference that he was recognized by the wife as her agent to buy supplies for the plantation and family on a credit, and apply the crops in payment. He deposes that such was his practice, with the knowledge and consent of his wife. We have referred to thus much of the evidence to show that the jury were justified in coming to the conclusion that they reached, and that we would transcend the boundary which divides the duties of judges and juries if we should interfere with this verdict on the ground of being against the great preponderance of the testimony. It is claimed that the acceptance by the plaintiff of the promissory note of John O. Guion was a merger of the open accounts into a security of higher dignity, and therefore, if Mrs. Guion was originally liable, she has thereby been discharged. In the case of Peter v. Bercely, 10 Pet. 567, the executors of Peter gave notes to the bank in lieu of or renewal of the debts of their testator. It was contended that thereby the debt due from the estate of the testator was extinguished. Not so held the court, unless the creditor accepted the notes in satisfaction of the original debt, and looked alone to the makers of the notes for payment.

In James v. Hackly, 16 Johns. 277, Spencer, C. J., for the court, said: "The acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is accepted as payment."

In Glenn v. Smith, 2 Gill & J. 508, one John Heslip received the notes of Ann Haslett for a debt against the estate of Wm. Haslett, deceased, and surrendered an account receipted. In the absence of all evidence except the receipt written at the bottom of the account, it was said by the court to be clear that the note of Ann Haslett did not extinguish the claim against the estate. The general rule is stated to be, "that the acceptance of a security of equal dignity is, of itself, no extinguishment of the antecedent debt."

The acceptance, by a creditor, of the promissory note of his debtor for an antecedent simple contract debt, does not extinguish the original debt (for both are of equal degree in legal contemplation), if it remains in the hands of the creditor, unpaid, and he can produce it to be canceled, or show that it is lost. There are cases which hold the rule to be the same if the note of a third person is taken, unless the creditor parts with it, or is chargeable with some laches with respect to it. 5 Term R. 513; Pinckford v. Maxwell, 6 Term R. 52; Bishop v. Rowe, 3 Maule & S. 362.

If however, there be an agreement by the creditor to receive it absolutely as payment, and to incur the risk of its being paid, the note, either of a debtor or of a stranger, operates as an extinguishment or satisfaction of the precedent debt. 7 Term R. 60; Toby v. Barbee, 5 Johns. 68; John v. Weed, 9 Johns. 310. In the case of Glenn v. Smith, 2 Gill & J. 493, the expression, "in payment of the above account," was held not to be sufficient evidence of an absolute discharge of the original debt. In the case cited from 6 Term R. 52, Lord Kenyon said: "If the bill which is given in payment does not turn out to be productive, and is not what the creditor expects it to be, it may be considered as if no such bill had been given." It is claimed in argument that the decisions of our predecessors in the case of Slocumb v. Holmes, 1 How. (Miss.) 144, and Myers v. Oglesby, 6 How. (Miss.) 50, declare a contrary doctrine. The latter case has no application, for in that case a bond was executed for the parol debt, and it was, therefore, the case of the merger of an inferior into a higher security, which extinguished the former. Nor does the former case, considered and construed by the facts before the court, militate against the current of authority from Westminster Hall and elsewhere. "The plaintiff declared on a promissory note, and also work and labor done, and goods sold and delivered. Among other matters, the defendant pleaded that the account filed was closed by the note declared on in the first count in plaintiff's declaration." The controversy was whether the note was given for the account, the plaintiff insisting that the note had no connection with the account, but rested on a different consideration. In this aspect of facts, the circuit court charged the jury that, if the note was given for the account, then the plaintiff could not recover on the account, which instruction was sustained as correct.

The case of Taylor v. Conner, 41 Miss. 728, holds that neither the note of the debtor nor that of a stranger will be a payment of the antecedent liability, unless accepted as such.

Objection was made to the reading of the note of Guion to the jury. The note of John O. Guion created no liability on his wife, and could not be evidence of any. The first count does not disclose a good cause of action against the wife. But the presence of the note on the trial, and before the jury, was proper enough as an element in the cause. Whether this paper was in absolute satisfaction for the goods sold and delivered, it was a fact in the cause,—part of the res gestæ of the pleadings between the parties, tending to help the elucidation of the proposition whether the goods were supplied on the sole credit and responsibility of the husband or on the faith of the wife's property and her credit.

The suggestion was made at the bar by the counsel for the plaintiff in error that there were features in this case materially distinguishing it from others in this court which dismissed the liabilities of married women, and we were invited to a very careful consideration of it. We have maturely examined the record and arguments of counsel, and are well satisfied that justice has been done, and that no error has been committed to the prejudice of the complaining party which would warrant this court in setting aside the verdict and judgment of the circuit court.

Let the judgment be affirmed.

CLARK v. DRAPER.

(19 N. H. 419.)

Superior Court of New Hampshire. Hillsborough. July Term, 1849.

Trover by one Clark against Aarson Draper for a pair of oxen. A verdict was taken by consent for plaintiff, on which judgment was to be entered, or the verdict was to be set aside and judgment entered for defendant, as the opinion of the court should be upon the whole case. Verdict set aside, and judgment for defendant.

Plaintiff purchased the oxen in suit of defendant for $60, giving his note for that amount, and defendant agreeing to keep the oxen for plaintiff until the following Saturday. At the same time defendant gave to plaintiff some brass knobs, which he said the oxen wore on their horns. Subsequently plaintiff sent for the oxen, and defendant refused to give them up without receiving the money for them, whereupon this action was instituted.

Mr. Pierce, for plaintiff. Mr. Sawyer, for defendant.

WOODS, J. This is an action of trover, and the plaintiff, in order to maintain it, must have either a special or general property in the thing demanded, together with the right of immediate possession. The property may be absolutely his, yet another may have had such a right to the possession of it when the demand was made and the action brought, that the plaintiff could not, against the will of such person, lawfully have taken it into his possession, and cannot, therefore, maintain the present action, founded, as it is, upon the assumption that his right to possess the chattels has been violated by the defendant.

It appears that in the month of September, 1847, the plaintiff bought the oxen of the defendant for sixty dollars, who agreed to keep them till the following Saturday for the plaintiff, at his request. No money or other thing was paid for the oxen, and no credit was stipulated for. Now that transaction constituted a sale of the chattels from the defendant to the plaintiff, who thereupon became the owner of them. A loss or destruction of them, or any damage happening to them afterwards, would have been the loss or detriment of the purchaser and not of the seller, and the claim of the latter for the price would have been in no wise affected by such an occurrence. 1 Inst. 21, 3.

But notwithstanding such change of property or ownership, the vendor had a right to retain the oxen till the price was paid. This lien of the vendor upon the goods sold for the payment of the purchase money, has been universally recognized at common law, and its principles somewhat extensively discussed in the cases. It will be sufficient to cite one or two of them.

A hop merchant sold to B. on diverse days in August, various parcels of hops. Part of them were weighed and an account of the weights, together with samples, delivered to the purchaser. The usual time of payment with the trade was the second Saturday subsequent to the sale. B. did not pay for the hops at the usual time, whereupon A. gave notice that unless they were paid for by a certain day they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B., who afterwards became a bankrupt, and then A. sold the remainder of the hops without the consent of B. or his assignees. Account of the hops so sold was delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees of B. demanded the hops of A., and tendered the charges of warehouse rent, &c., and on the refusal of A. to deliver them, brought trover. It was holden that the assignees could not maintain the action, because the party must have for that purpose, not only a right of property but a right of possession; and that although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price. Bloxam v. Sanders, 4 B. & C. 941, 10 Eng. C. L. Rep. 868.

Nor as between the original vendor and vendee is the lien of the former divested by his giving to the vendee a delivery order for the goods sold, but remaining in the vendor's warehouse rent free, although it appeared that by the usage of trade in Liverpool, where the parties dealt, goods sold while in warehouse are delivered by the vendor's handing to the vendee a delivery order, and that the holder of such order may obtain credit with a purchaser, as having possession of the goods. Townley v. Crump, 4 Ad. & El. 58.

To the same effect is the case of Tooke v. Hollingworth, 5 Term R. 215.

The doctrine is fully established in this state by the case of Williams v. Moore, 5 N. H. 235.

That there was no actual delivery in this case, so as to destroy the lien of the defendant for the price, is clear. And the delivery of a part as and for the whole, or a symbolical or constructive delivery, if sufficient for such an effect, is not made out by the delivery of the brass knobs that had been worn upon the horns of the oxen. They were not delivered with the intention of thereby making a tradition of the oxen, which is the essence of a symbolical delivery. But the cases plainly show that the lien is preserved upon all and every parcel of the goods sold which actually remain in the hands of the vendor.

Nor can the giving of the note for the price, payable on demand, in any view, be considered as a payment of the price. The doctrine on this head was fully considered and settled in Jaffrey v. Cornish, 10 N. H. 505, where it was held that a promissory note given for the amount of a party's taxes, was not a payment of the taxes for the purpose of gaining a settlement. The taking of a note is in no case the payment of a debt, unless there be a special agreement to that effect. The present is

a strong and clear case for the application of that doctrine; and distinct proof that the party taking the note intended thereby to part with his lien upon the property, would be required.

The conclusion, therefore, is, that the present action cannot, upon the evidence reported, be maintained; that the verdict must be set aside, and there must be

Judgment for the defendant.

CUSACK et al. v. ROBINSON.

(1 Best & S. 299.)

Queen's Bench, Trinity Term. May 25, 1861.

Declaration for goods sold and delivered, and goods bargained and sold. Plea, never indebted. At the trial before Blackburn, J., at the Liverpool winter assizes in 1860, it appeared that the defendant, who was a London merchant, on the 24th October, 1860, at Liverpool called on the plaintiffs, who are importers of Canadian produce, and said he wanted to buy from 150 to 200 firkins of Canadian butter. He then went with one of the plaintiffs to their cellar, where he was shown a lot of 156 firkins of butter, "ex Bohemian," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which however did not suit the defendant. At a later period of the same day the plaintiffs and the defendant made a verbal agreement by which the defendant agreed to buy that specific lot of 156 firkins at 77s. per cwt. When the price had been agreed on, the defendant took a card, on which his name and address in London were written, "Edmund Robinson, 1 Wellington Street, London Bridge, London," and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs, and at the same time said that his agents Messrs. Clibborn, at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. The plaintiffs by Clibborn's directions delivered the butter to Pickford's carts to be forwarded to the defendant at Fenning's Wharf. The plaintiffs sent an invoice dated the 25th October, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th October the plaintiffs in Liverpool received a telegram from the defendant in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty that was equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept. A clerk at Fennings' Wharf proved that Messrs. Fenning stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October Pickford & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th October. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to Pickford & Co. under a delivery order from the defendant dated 27th October. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded £10, and that there was nothing proved to satisfy the requisitions of the statute of frauds. The verdict was entered for the plaintiffs for £420 10s. 1d., with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

In Hilary term, 1861, Edward James obtained a rule nisi. Mellish and Quain shewed cause. Milward, in support of the rule.

BLACKBURN, J. (After fully stating the facts his lordship proceeded.) It was not contended that there was any sufficient memorandum in writing in the present case; but it was contended that there was sufficient evidence that the defendant had accepted the goods sold and actually received the same; and on consideration we are of that opinion.

The words of the statute are express that there must be an acceptance of the goods or part of them, as well as an actual receipt; and the authorities are very numerous to shew that both these requisites must exist, or else the statute is not satisfied. In the recent case of Nicholson v. Bower, 1 E. & E. 172, which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat: on the contrary it was shewn to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods; and each of the judges mentions that fact as the ground of their decision. In Meredith v. Meigh, 2 E. & B. 361, the goods, which were not specified in the original contract, had been selected by the vendor and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with Hanson v. Armitage, 5 B. & Ald. 557, that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree; for though the selection of the goods by the vendor, and putting them in transit, would but for the statute have

been a sufficient delivery to vest the property in the vendee, it could not be said that the selection by the vendor, or the receipt by the carrier, was an acceptance of those particular goods by the vendee.

In Baldey v. Parker, 2 B. & C. 37, which was much relied on by Mr. Milward in arguing in support of this rule, the ground of the decision was that pointed out by Holroyd, J., who says (page 44): "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." The principle here laid down is, that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller as unpaid vendor so as to preserve his lien; and it has been repeatedly recognized. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute. Marvin v. Wallis, 6 E. & B. 726; Beaumont v. Brengeri, 5 C. B. 301. In both of these cases the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods when placed in Fenning's Wharf were put under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance; and the only remaining question is, whether it is necessary that the acceptance should follow or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In Saunders v. Topp, 4 Exch. 390, which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff forty-five couple of sheep, which the defendant, the purchaser, had himself selected, and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was in addition some evidence that the defendant, after seeing them in the field, counted them, and said it was all right; and as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. Parke, B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant: but in his judgment he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three barons—Alderson, Rolfe, and Platt—express an inclination of opinion that it is necessary under the statute that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord Campbell in Morton v. Tibbett, 15 Q. B. 428, in which the nature of an acceptance and actual receipt sufficient to satisfy the statute is fully expounded, he says (page 434): "The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. The intention of the legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor by the vendee's directions parts with the possession, and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think therefore that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are therefore of opinion that there was evidence in this case to satisfy the statute and that the rule must be discharged.

Rule discharged.

BABCOCK v. BONNELL.

(80 N. Y. 244.)

Court of Appeals of New York. Jan. Term, 1880.

Action by the administratrix of Babcock against Bonnell for an accounting for the proceeds of a policy of insurance taken out on the life of Babcock, and delivered to defendant as collateral security for two promissory notes of Babcock & Co. for $4,678.48. Bonnell afterwards received from one Wheelright $925 in full satisfaction of the notes, which were delivered to Babcock & Co. and destroyed.

Wm. W. Niles, for appellant. Julien T. Davis, for respondent.

CHURCH, C. J. The finding of the trial judge that the policy was taken out and delivered to the defendant as collateral security for the payment of the indebtedness of Babcock & Co. to him was warranted by the evidence. No other conclusion could be arrived at, and the evidence is substantially undisputed.

Some years afterward Mr. Babcock expressed a desire not to be regarded as having an interest, and stated that the entire interest was in the defendant; but I do not think that this expression, under the circumstances, would have the effect of a release, or create an estoppel. There is no dispute that at the time the policy was taken out, there was an indebtedness in favor of the defendant against Babcock & Co., evidenced by two notes, amounting to $4,678.48. The policy was issued in February, 1870, and it is claimed and found that in April, 1870, these notes were compromised and settled, and that the defendant received from one Wheelright, on behalf of Babcock & Co., $925 in money, in full satisfaction and discharge of said indebtedness, and delivered and surrendered said notes to him, and that they were afterward delivered up to Babcock & Co., who destroyed and canceled them. Wheelright testified that he purchased the notes of the defendant, and paid his own money, and delivered them to Babcock & Co. upon being repaid that amount and his expenses. In either view we think the debt was discharged. It was an executed accord. Nothing remained executory, and it operated as a full satisfaction. A mere promise to accept less than the full amount of a debt although the sum promised has been paid has been held not sufficient; but when the security has been surrendered, or some act done of a like nature, there is no reason in law or morals, why the party should not be bound. Kromer v. Helm, 75 N. Y. 574.

It may be that the defendant intended to hold the policy of insurance to indemnify him for the deficiency, but there was no agreement to that effect, and the defendant's letters indicate that he had regarded the debt fully released and canceled. The defendant claims also to hold the policy as security for the balance of an additional indebtedness of $1,226.44 and interest, after applying the proceeds of a cargo of coal, the finding in respect to which is here inserted. "Fourth. On the 15th day of November, 1869, the defendant sold a cargo of coal to said Charles A. Babcock & Co., and took a note in payment therefor of $1,226.44, due March 15, 1870; the said last-mentioned cargo of coal was shipped to said Charles A. Babcock & Co. by the schooner Hepzibah, on or about the 21st day of February, 1870, the defendant through his agent, Edward Gullager, stopped the said last-mentioned cargo of coal in transitu, took possession thereof and disaffirmed the contract of sale therefor, and on the 4th day of May, 1870, sold the said last-mentioned cargo of coal to one E. S. Farrar." If this finding can be sustained as a finding of fact, it disposes of any claim for the debt. If the disaffirmance of the contract of sale of the coal depends as matter of law upon the stoppage of the coal in transitu, then a more difficult and doubtful question is presented. Every intendment is in favor of the findings of facts, and findings may be implied if warranted by the evidence to sustain a judgment. The evidence as to the stoppage of the coal, as to the possession of the defendant, and the sale thereof by him does not present the facts as clearly as would be desirable upon this question. If the defendant took possession of the coal in the exercise of the right of stoppage in transitu, and sold the same without notice to Babcock & Co., and without their consent, and especially before the debt was due, an inference of an intention to disaffirm the contract of sale might be drawn, because upon the theory that this right is to enforce a lien, as claimed by the defendant, he must hold the property until the expiration of the credit, and be able to deliver it upon payment of the price, and the vendee has the right to pay the price and take the property. According to that theory the credit is not abrogated, nor the sale, but the vendor is permitted to re-take the possession of the property, and hold it as security until the price is paid. If not paid at the time stipulated the vendor, in analogy to other cases of lien, may sell the property upon giving notice.

The general rule upon the theory of a lien must be that the vendor having exercised the right of stoppage in transitu, is restored to his position before he parted with the possession of the property. The property is vested in the vendee, and the vendor holds possession as security for the payment of the purchase price. If therefore the defendant sold the coal without notice or consent, or if with consent of the vendees with the understanding that the sale was to be deemed rescinded the finding would be jus-

tified, and the defendant would have no claim upon this note.

The coal was sold to one Farrar, and a bill of sale thereof made by the defendant, and he received the purchase-money. The coal was sold and the bill of sale and payment were not made until April, after the note became due, and there is some conflict in the evidence whether it was made with the knowledge or consent of Babcock & Co., or not.

As to the legal question, although the right of stoppage in transitu has been recognized in England for nearly two hundred years, there is great confusion in the books as to the origin of the right, and the principles upon which it is founded. As late as 1841 Lord Abinger said, that "although the question of stoppage in transitu had been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity which the common law has adopted."

Mr. Parsons, in his work on Admiralty, says, there are three ways, in either of which it might be supposed that the law of stoppage entered into the law of England. One that it is based upon the civil law by which, in case of a sale, the property does not pass to the buyer until he has possession of the goods. It would follow that the seller would continue the owner until they reach the buyer, and that by the insolvency of the latter the goods would remain the property of the former. By the common law a sale does of itself pass the property to the buyer, without delivery. Another way is by implying a right of rescinding the contract of sale in case of insolvency, and that the act of stoppage was an exercise of that right, and a third way is by implying constructive possession in the seller for the purpose of a lien, to be enforced by the act of stoppage, or, in other words, that this right is an enlargement of the common-law right of lien. Pars. Adm. 479.

The rule seems not to have been settled in 1842. Parke, B., said: "What the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet fully decided, and there are difficulties attending each construction."

Mr. Bell, in his Commentaries on the Law of Scotland, favors the doctrine of rescission. He says: "Although there are many difficulties either way, it appears, on the whole, most consistent with the great lines of this doctrine of stoppage in transitu, that the seller's security over the goods sold, though perhaps in a large sense of the nature of a lien, is given by equity originally on the condition that the seller shall take back the goods, as if the contract were ab initio recalled."

There are some other authorities favoring the same view, and there are others that favor the theory of a lien. Feise v. Wray, 3 East, 93; Ex parte Gwynne, 12 Ves. 379; Lickbarrow v. Mason, 6 East, 21, note.

Mr. Parsons says that the earlier English cases sustain the doctrine of a lien, and intimates that later authorities changed the ground to that of rescission, but that the latest returned to the original doctrine. Pars. Adm. 481. Whatever uncertainty there may be as to the rule in England, the decisions in this country are quite preponderating in favor of the theory of a lien. Rowley v. Bigelow, 12 Pick. 307; Stanton v. Eager, 16 Pick. 467–475; Arnold v. Delano, 4 Cush. 33, 39; Newhall v. Vargas, 13 Me. 93, 15 Me. 314; and cases cited; Rogers v. Thomas, 20 Conn. 53; Jordan v. James, 5 Ohio, 88–98; Harris v. Pratt, 17 N. Y. 263. The elementary writers favor the same view. 2 Kent, Comm. 541; Pars. Adm. 483; Pars. Cont. 598. The question has never been, that I am aware, definitely decided in this state. As an original question the doctrine of rescission commends itself to my judgment as being more simple, and in most cases, more just to both parties than the notion that the act of stoppage is the exercise of a right of lien, but in deference to the prevailing current of authority, I should hesitate in attempting to oppose it by any opinion of my own, and for that reason I do not deem it necessary to state the grounds which influence my judgment.

It is found as a fact that the policy was delivered to the defendant as collateral security for the payment of the first two notes referred to only, "and that the defendant never acquired or had any interest in said policy or in the moneys to accrue or become payable thereon, except as a creditor of the said firm, and to the extent of his claim upon the aforesaid two notes against the said firm." The evidence justified his finding. The letter of the defendant of March 1, 1876, shows that he did not then suppose that he had any legal indebtedness against Babcock & Co. At the time the policy was issued the cargo of coal for which the last note was given was in possession of the defendant as he claimed, and had not been disposed of, so that the balance, even if Babcock & Co. were liable for it, could not then be known, and in March after, in a letter to the defendant, introducing Mr. Wheelright, Babcock & Co. say: "We will avail our-

selves of the opportunity to have him arrange for the settlement of your claim against us, leaving in abeyance the cargo of Hepzibah, and the note given in settlement of the same."

The testimony of the insurance agent is to the effect that the policy was delivered to secure a fixed indebtedness, which could only refer to the first two notes. We are of opinion therefore that the defendant has no lien upon this money to secure the balance of the note given for that cargo of coal, even if Babcock & Co. are liable for it.

It follows that the judgment must be affirmed.

All concur, except EARL, J., dissenting.

KINGMAN et al. v. DENISON et al.

(48 N. W. 26, 84 Mich. 608.)

Supreme Court of Michigan. Feb. 27, 1891.

Error to circuit court, Kent county; William E. Grove, Judge.

Replevin by Kingman & Co. against William C. Denison and the McCormick Harvesting Machine Company. There was a judgment in defendants' favor, and plaintiffs bring error.

Taggart & Denison, for appellants. Sweet & Perkins, for appellees.

LONG, J. On July 8, 1889, defendant Denison wrote the plaintiffs at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiffs received the letter next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiffs taking shipping bill from the railroad company there, and on the same day sent it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17th, and on the 18th they turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made. It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10th, 11th, and 12th he gave mortgages on the same property to several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as its agent. The McCormick Harvesting Machine Company mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any and all the above-described property." On September 7th plaintiffs, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiffs wrote him for prompt remittance, which was not made. On September 19, 1889, plaintiffs brought replevin against the defendants for the twine, finding about one-half of it; the balance having been sold out of the store by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiffs for $351.91, the value of the twine taken, and costs. Plaintiffs bring error.

The plaintiffs asked the court to instruct the jury that plaintiffs were entitled to a verdict; and in the ninth request asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgagees to assume control of it, plaintiffs could retake it as against him." And in the fourteenth request it was asked that the jury be instructed that the McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a bona fide purchaser. Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on the 18th of July. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests set out were refused by the trial court, and upon such ruling the plaintiff assigns error. The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced — First, Because as counsel claims, the goods were ordered, were purchased, by Mr. Denison at a time when he was insolvent, and knew that he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and the plaintiff's counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts of this case as shown by the evidence, has no application whatever; there is no such right existing." This part of the charge relating to the right of stoppage in transit is assigned as error. The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case. The right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to

the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. Gibson v. Carruthers, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vendor and vendee in process, and for the purpose of delivery, and this right may be exercised whether the insolvency exists at the time of the sale or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. O'Brien v. Norris, 16 Md. 122; Reynolds v. Railway Co., 43 N. H. 580; Blum v. Marks, 21 La. Ann. 268; Benedict v. Scaettle, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. Harris v. Pratt, 17 N. Y. 249. In the present case it appears that the goods arrived in Grand Rapids July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and was in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed that by the terms of their mortgage they were entitled to hold the twine. The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed that they passed to it under the terms of its mortgage. It however, stood in no better position than Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. It does not stand in the position of a bona fide purchaser of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison. These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendors' rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. Underhill v. Booming Co., 40 Mich. 660; Lentz v. Railway Co., 53 Mich. 444, 19 N. W. 138; White v. Mitchell, 38 Mich. 390; James v. Griffin, 2 Mees. & W. 623. In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them. The judgment of the court below must be reversed, with costs, and a new trial ordered. The other justices concurred.

TUFTS v. SYLVESTER.

(9 Atl. 357, 79 Me. 213.)

Supreme Judicial Court of Maine. March 1, 1887.

On report from supreme judicial court, Franklin county.

Trover by the vendor of merchandise against the messenger of the insolvent vendee. The opinion states the facts.

S. Clifford Belcher, for plaintiff. H. L. Whitcomb, for defendant.

PETERS, C. J. The plaintiff sold a bill of goods to be shipped at Boston to the buyer at Farmington, in this state. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came, he had gone into insolvency, and a messenger had taken possession of his property. An express company bringing the goods tendered them to the buyer, who refused to receive them, but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand upon both the carrier and the messenger, attempting to reclaim his goods. The question, upon these facts, is whether the goods were seasonably stopped in transitu to preserve the plaintiff's lien thereon. We think they were. The right of stoppage in transitu is favored by the law. It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to a confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and thus leave unimpaired the right of stoppage in transitu, unless the vendor be anticipated in getting possession by the assignees of the buyer." Benj. Sales, § 858. In Grout v. Hill, 4 Gray, 361, Shaw, C. J., says: "Where a purchaser of goods on credit finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor on such notice expressly or tacitly assents to it, it is a good stoppage in transitu, although the bankruptcy of the vendee intervene." See same case at page 369; 1 Pars. Cont. *596, and cases.

The decision of the case, then, turns upon the question whether the messenger could accept the goods, and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity; is intrusted with no discretionary powers; acts under mandate of court, or does certain things particularly prescribed by the law which creates the office; is mostly a keeper or defender of property,—a custodian until an assignee comes; and he can neither add to nor take from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or disaffirm any act of the insolvent. The law imposes on him no such responsibility. Chancellor Kent says that the transit is not ended while the goods are in the hands of a carrier or middle-man. A messenger has no greater authority, ex officio, than a middle-man, excepting as the insolvent law expressly prescribes. In Hilliard's Bankruptcy (page 101) the office of a messenger is likened to that of a sheriff under a writ. He becomes merely the recipient of property. The title of the assignee when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of lands sold for taxes. Hampton v. Rouse, 22 Wall. 263. See Stevens v. Palmer, 12 Mete. 464. The case cited by the plaintiff, Sutro v. Hoile, 2 Neb. 186, supports this contention.

Defendant defaulted.

WALTON, VIRGIN, LIBBEY, EMERY, and HASKELL, JJ., concurred.

BEEMAN v. LAWTON.

(37 Me. 543.)

Supreme Judicial Court of Maine. 1854.

On exceptions from nisi prius; Rice, Judge.

Trover for the conversion of a piano forte. Both parties claimed under one Bartlett who mortgaged it to defendant, in February, 1851, which mortgage was recorded, and some months after (November 4, 1851,) gave a bill of sale of it to plaintiff, but he could prove no delivery or possession. The plaintiff introduced evidence tending to show that the mortgage was made with the design of defeating the creditors of Bartlett. The defendant proved by his partner in business (after a release by him of all his interest in the piano) that in May, 1851, Bartlett wished him to become surety for him on a poor debtor's bond. He declined. Bartlett then said to defendant: "You have that piano. If you will sign the bond, and I don't hold you harmless, you take the piano, and sell it or keep it, as you see fit." The defendant and his partner signed the bond. In the succeeding fall the defendant took the piano into his possession. In the spring of 1853 the witness paid the execution upon which the bond was given out of the partnership funds, amounting to $140. The judge instructed the jury that, if Bartlett authorized the defendant to sell or keep the piano in consideration that his partner would sign the bond, then the release of said witness to defendant discharged the defendant's claim. The verdict was for plaintiff, and defendant excepted.

Paine & Clay, for defendant. Danforth & Woods, for plaintiff.

APPLETON, J. It appears that on February 27, 1851, one Bartlett, from whom both parties derive title, executed a mortgage of the piano in dispute to the defendant, who in the fall following took the same into his possession. The plaintiff's bill of sale was dated November 4, 1851. As between these opposing titles, that of the defendant was prior, and possession was acquired under it, but it was resisted on the ground that it was fraudulent. No exceptions having been taken to the instructions on this branch of the case, they must be deemed correct. Indeed, it was conceded that the instructions given did not apply to the written mortgage, so that the question to be considered is whether they are erroneous in reference to the subject-matter to which they were specially applicable. The verdict of the jury, which was for the plaintiff, tends to establish the fact that the written mortgage was fraudulent or invalid for some other cause, as, unless such had been the case, the defendant, being in possession under a title prior to the plaintiff, must necessarily have been entitled to a verdict.

It appears that in May, 1851, Bartlett called on S. W. Lawton, a witness in the case, with his brother, the defendant. Bartlett wished the witness to execute as surety for him a poor debtor's bond, which he declined. He then turned to the defendant, and said: "You have the piano, and if you will sign the bond, and I don't hold you harmless, you take the piano, and sell it or keep it, as you see fit." The witness signed the bond. Last spring the witness paid the execution upon which the bond was taken, out of the joint funds of the defendant and himself, they being partners. The amount paid was $140. It is in reference to this transaction that the instructions complained of were given.

It is to be observed that at this time the defendant was not in possession, so that the conversation related to a piano of which he neither had possession nor (the mortgage being for some cause void) the right to possession. The defendant claimed that this transaction constituted a mortgage, but such was not its character. By Rev. St. c. 125, § 32, no mortgage "shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; or unless the mortgage has been or shall be recorded by the clerk of the town where the mortgager resides." A delivery of personal property for security is not a transfer on condition, and does not constitute a mortgage thereof, but a pledge merely. Eastman v. Avery, 23 Me. 248. So that, even if the piano had been delivered for the purposes of security, the defendant could not have held the property as mortgagee. Much more will it not constitute a mortgage when the property is neither present nor delivered.

The defendant shows no right to retain the property as a pawn or pledge. To constitute a pawn or pledge, there must be a delivery and retention of the possession of the thing pawned. If the pawnee give up the possession to the pawner, his rights are gone. The element of possession failing, there can be no pawn nor pledge. Story, Bailm. § 300; Haven v. Law, 2 N. H. 16; Bonsey v. Amee, 8 Pick. 236. It can at most be viewed only as a mere executory agreement, conferring no rights of possession or property over the thing to which it related.

The witness Lawton, was neither mortgagee, pawnee, nor vendee, and could confer no right on the defendant to retain possession, nor would his release be of any avail. As by the transaction of May no rights were acquired by the defendant or the witness, and as the instructions related thereto, they must be regarded as immaterial. Exceptions overruled.

SHEPLEY, C. J., and TENNEY and CUTTING, JJ., concurred.

HARDING v. COBURN.

(12 Metc. 333.)

Supreme Judicial Court of Massachusetts. March Term, 1847.

This was an action of trespass against a deputy sheriff for taking and carrying away one wagon carriage, ironed, one wagon body, partly finished, five hundred felloes, two hundred carriage hubs, one cab body, one wheel jack, two axle-bar arms, one set of axle bars, a lot of scrap iron, and one hoop; all of the value of $420.

At the trial in the court of common pleas, before Ward, J., the defendant justified under a writ against Rufus Rowell, as whose property the defendant attached the chattels described in the plaintiff's writ. The plaintiff claimed the chattels under two mortgages made to him by said Rowell. The first mortgage was dated July 13, 1843, and described the mortgaged property as follows: "All and singular the stock, tools, and chattels belonging to me, in and about the wheelwright's shop occupied by me, situated on the easterly side of the Dorchester turnpike, in that part of Boston called South Boston." The second mortgage, dated June 12, 1844, was of "the following described stock, chattels, and articles, situated and being in and upon the land and buildings occupied by me on the Dorchester turnpike, in that part of Boston called South Boston, viz.: Six hundred hubs; four thousand feet of ash plank; two thousand feet of oak plank; four thousand feet of bass wood; four thousand feet of spokes; ten sets of wheels; ten wagon bodies; four express wagons; ten wagon carriages; a blacksmith's shop; all my tools and implements in my wood shop, paint shop, and blacksmith's shop; and all other my personal property situated as aforesaid, together with all other personal property which I may put on said premises during the term hereinafter mentioned [one year] in the place of property above enumerated, which may be sold and delivered by me during said term."

The plaintiff gave in evidence the following demand on the defendant, and statement of his claim against Rowell:

"To Daniel J. Coburn, Deputy Sheriff: I, Wilder Harding, of Boston, do hereby demand payment of, and indemnity for, the amount stated in the following account, viz.:

Rufus Rowell's duebill to me, dated February 27th, 1844, for	$ 4 50
Rufus Rowell's note to me, dated May 2d, 1844, for	325 50
Rufus Rowell's note to me, dated May 6th, 1844, for	174 82
Rufus Rowell's note to me, dated May 6th, 1844, for	270 00
Rufus Rowell's note to me, dated May 29th, 1844, for	335 50
Rufus Rowell's note to me, dated July 19th, 1844, for	63 00
	$1,173 32

"All the above demands are now due and payable from said Rowell to me.

"I also demand of you indemnity for my liability as indorser, for the accommodation and benefit of said Rowell, of the following described notes of hand, viz.:

Rufus Rowell's note to me, due October 8th, 1844	$ 352 67
Rufus Rowell's note to me, dated Nov. 3d, 1843, payable in one year from date, for	1,000 00
Rufus Rowell's note to me, due December 1st, 1844	304 83
	$2,830 82

"The foregoing demand is made on you in consequence of an attachment made by you, on a writ in favor of Phineas E. Gay and C. E. Stratton against Rufus Rowell, returnable at the next October term of the court of common pleas for the county of Suffolk; which property I claim to hold under two mortgages executed and delivered by said Rowell to me,—the one dated July 13th, 1843, recorded in the registry of mortgages for the city of Boston, lib. 35, fol. 239; the other dated June 12th, 1844, and recorded in said registry, lib. 40, fol. 19.

"Boston, September 23d, 1844.

"Wilder Harding."

It was admitted that no part of the property attached was specifically described in the last mortgage. But the plaintiff contended that it passed under the general clause in the mortgages.

It appeared that Rowell was extensively engaged in carriage building at South Boston, and there occupied one large lot of land, having distinct shops thereon for the different branches of his business, but all connected together, so as to make one range of buildings; and that the mortgaged property was in these premises.

The plaintiff called witnesses to show that the identical property attached was on said premises at the date of the last mortgage. This evidence was admitted, though objected to by the defendant; but the judge ruled that no articles passed under the mortgage but such as were on the premises at the date of the mortgages.

The plaintiff's evidence then tended to show that two axle arms, $2; one cab body, $40; one hundred and twenty-five hubs, $62.50; and one hundred and seventeen felloes, $4.68, —were the property of Rowell, on his premises, at the date of the second mortgage, and were included therein, under the general clause; that, besides the one hundred and twenty-five hubs above named, there were six hundred other hubs, specifically named in said mortgage, and not attached by the defendant; that the cab body was on the premises, at the date of the mortgages, unfinished, and that work and materials had been added to it since.

The plaintiff introduced evidence tending to show that his claim against Rowell, under the mortgages, was substantially correct, as stated in his demand upon the defendant.

The defendant's counsel then made the fol-

lowing objections to the maintenance of the plaintiff's action: (1) That the first mortgage was void. The court so ruled, and the plaintiff abandoned that mortgage at the trial. (2) That the second mortgage passed no property besides that which was specifically and particularly described. But the judge ruled that the property situate on the premises at the date of the mortgage, and included in the general description in the mortgage, might pass, though not specifically set out. (3) That the specific enumeration of six hundred hubs in the mortgage excluded the other one hundred and twenty-five hubs from passing under the general clause. But the judge ruled that they might pass, if such was the intention of the parties at the time. (4) That said mortgage should not cover any property which had been changed by manufacture since the date of the mortgage. But the judge ruled, and instructed the jury, that if so much labor and new material had since been added by Rowell to any article mortgaged as substantially to change it, or so that the subsequent additions of labor and material became an important part of its present value, it would not pass to the mortgagee; but that, if it remained substantially the same, it might pass. (5) That the plaintiff's demand and statement in writing were in form insufficient. But the judge ruled otherwise. (6) That the plaintiff's said demand was insufficient, because his claim, as proved, and that set out in his written statement, were not the same in amount. The judge ruled and instructed the jury that it was incumbent on the plaintiff to prove his written statement to be substantially true and correct; that any fraudulent or substantial error in his statement would defeat his action; but that no slight, innocent, and immaterial misstatement would defeat his action, if the jury were satisfied that his statement was substantially correct and true.

It appeared that the defendant, before making the attachment, took copies of the two mortgages to the premises of Rowell, and laying aside, by the assistance of Rowell, all the articles specifically enumerated in the second mortgage, attached all other articles there found. And it also appeared that Rowell, after making the mortgages, continued to conduct his business as usual, remaining in possession of the property, and changing it by manufacture, and for other property, and mixing it with his other newly-purchased property.

The plaintiff claimed to hold all the property, new and old, by virtue of his mortgages.

The defendant objected that the plaintiff, not having pointed out and demanded the precise articles which he claimed, and having permitted the mortgagee to remain in possession, and to mix the mortgaged property with his newly acquired property of the same kind, the action of trespass could not be maintained. Upon this point (it being admitted that the plaintiff claimed bona fide the whole of the property as covered by his mortgages, the newly-acquired as well as the old property) the judge ruled against the defendant.

The defendant also objected that the plaintiff's demand was insufficient, because it did not distinguish the property claimed under each mortgage, nor the amount of the plaintiff's lien on each part of it, but was general on both mortgages. But the judge overruled the objection.

It was agreed by the parties that the jury, if they should find for the plaintiff, might return a verdict specifying as to what articles they found. The jury found the defendant guilty as to the four items above mentioned, viz. two axle arms, one cab body, one hundred and twenty-five hubs, and one hundred and seventeen felloes, and assessed damages at $109.18; and not guilty as to the other articles mentioned in the plaintiff's writ. The defendant alleged exceptions to the foregoing rulings and instructions of the judge.

D. A. Simmons, for plaintiff. Mr. Ellis, for defendant.

DEWEY, J. The first point arising upon the mortgage under which the plaintiff claims to hold the property in controversy is as to the validity of a general description of the property mortgaged; such as "all my tools and implements in my shop in B.," or other equally general words of description. It is insisted by the defendant that such general description has no legal force and effect, and that nothing short of a specific description of the various articles mortgaged can avail a mortgagee relying upon a recorded mortgage, and the possession remaining with the mortgagor. No direct authorities are cited to establish this position, although some cases are referred to giving some countenance to such doctrine. But the argument principally pressed upon our consideration was that of the importance of such construction of the law as the only one that would give effectual notice to all concerned of what was actually intended to be conveyed by the mortgage.

We all feel the force of this argument, and the great importance of requiring as much certainty in contracts of this nature as the case will reasonably admit. If it were practicable to set forth, on the face of the mortgage, with entire precision, all the specific articles embraced in it in such a manner that the inspection of the mortgage, without reference to any other evidence or source of information, would enable one to ascertain with certainty the property mortgaged, it would be highly important and useful that such description of the property should be required to be given in every case. But a little consideration has satisfied us, and must satisfy any one, that in a large portion of the cases resort must be had to parol evidence to ascertain the identity of the prop-

erty mortgaged. Most personal property must, from the nature of the case, be described in such general terms as to leave no other alternative but to resort to parol evidence to identify it. Apparently it seems a more bald description to say "all my household furniture" than to enumerate the articles, and describe them as "two dozen of chairs, five tables," etc.; but in reality the latter will require extrinsic evidence to identify the property as much as the former would. Or take the case of a mortgage of live stock on a farm. The general description would be, "all my stock on my farm." The particulars are, "ten cows, two yoke of oxen," etc.; but in both you must rely upon other sources than the mortgage for the identity of the property mortgaged.

There is nothing in the statute itself (Rev. St. c. 74) prescribing the form of mortgages of personal property. The statute deals with them as instruments known and recognized by the common law, and only provides as to the possession of the property being retained by the mortgagee, or that the mortgage be recorded in the proper office. The statute leaves in full force a mortgage at common law, if the mortgagee takes and continues the possession in himself. Such mortgages, with general descriptions of the articles, have ever been considered good.

Several cases have been before us which were open to the objection now raised, and so far, therefore, as a silent acquiescence in such cases by counsel would furnish any inference that the objection was untenable, the plaintiff is entitled to the benefit of it. Perhaps no very strong inference should be drawn from that circumstance. But the case of Winslow v. Insurance Co., 4 Metc. (Mass.) 306, seems to have raised the precise question we are considering. It was a mortgage of "all and singular the goods, wares, stock, iron, tools, manufactured articles, and property of every description, being situate in or about the shop or building now occupied by me in Hawley street." The mortgage in that case was not only liable to the objection that it was general in its description of the property, but also to the further objection that it was imperfect and incomplete, and contemplated something further to be done, inasmuch as it also provided that "a particular schedule of the property shall be annexed hereto as soon as conveniently may be." No such schedule, however, was annexed; but the court held the general description of the property sufficient to entitle the mortgagee to hold the same. Nor will the enumeration of certain specific articles prevent others of like kind, if included in the general description, from passing under the mortgage.

The next question raised relates to the ruling as to the property in certain articles that had undergone a change by manufacture, after the date of the mortgage and before the attachment by the defendant. The ruling upon this point was, we think, sufficiently favorable to the defendant; perhaps too much so in reference to the effect of subsequent additions of labor and material in divesting the mortgagee of his right of property. We understand this instruction to have been that the article must remain substantially the same in order to preserve the property in the mortgagee; and, if such identity was continued, additions, not making an important part of its whole present value, would not divest the mortgagee of his interest.

The defendant further objects to the sufficiency of the demand of the plaintiff, and his statement of the amount due on the mortgage. To sustain the objection he relies upon the case of Moriarty v. Lovejoy, 23 Pick. 321. We think the cases distinguishable, and particularly in this: that in the case cited the statement of the mortgagee did not allege that it was a mortgage of the property then attached, and in the hands of the officer, which latter averment is substantially found in the present statement, and to the extent of the property then actually attached and in the defendant's possession; and this is a sufficient demand.

It is next objected that the ruling of the court was erroneous upon the question of a supposed variance between the plaintiff's statement of the amount of his claims under the mortgage and the actual sum which, upon a just and true account, the jury would find due, upon the evidence in the case. The question before us is not as to the weight of the evidence upon this point, or whether the jury found a verdict against the weight of the evidence; but whether the verdict was found under proper instructions from the court.

If the amount stated might, upon the evidence, have been found a just and true account of the liability arising under the second mortgage, then the finding was well authorized. We understand the ruling of the court to have required the jury, before returning a verdict for the plaintiff, to find that there was no material misstatement of the amount due from Rowell to the plaintiff; and this implies that it was not overstated. If it were so to any amount proper to be regarded in a court of justice, the defendant, under this ruling, must have had a verdict in his favor. The instruction seems sufficiently guarded. This subject has been before us recently in the case of Rowley v. Rice, 10 Metc. (Mass.) 7, to which we refer. Applying the principles of that case to the present, if there were an overstatement of the amount due to the plaintiff in the demand made by him, yet the whole facts would present a case where, under that decision, no damage had accrued to the defendant by the overstatement, as he would have had no inducement to redeem the property if the amount due had been stated with the most scrupulous accuracy; the property in

controversy being of much less value than the debt secured by the mortgage, supposing the amount had been truly stated.

It is further objected that the plaintiff cannot maintain the action, although he may have been the owner of sundry articles taken by the defendant by virtue of a writ of attachment against the mortgagor; inasmuch as the articles now claimed by the plaintiff were found in possession of the debtor, and intermingled with various other articles that were not mortgaged, and which were properly attached as the property of the debtor, and the plaintiff not having pointed out the precise articles claimed by him. To a certain extent the principle here relied upon by the defendant has been sanctioned by the court. The leading case was Bond v. Ward, 7 Mass. 123. This was followed by Sawyer v. Merrill, 6 Pick. 478, and Shumway v. Rutter, 8 Pick. 443. The principle settled by these cases was that, if the goods of a third person in possession of the debtor, and so intermingled with the debtor's goods that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer, until notice, and a demand of his goods of the officer, and a refusal by him. All these cases presented this point as arising upon one species of property, viz. household furniture. They were cases where no difficulty existed in pointing out the precise articles claimed, and where the omission to do so, as it tended to entrap a public officer in the discharge of his duty, might reasonably be held to bar his right of action. They were cases where the owner knew the precise nature and extent of his claim, and the articles owned by him; where he had it in his power to designate and point out those articles, in distinction from other articles to which he made no claim. And the rules of fair dealing may well require, under such circumstances, that the particular articles claimed by him be pointed out and demanded before the officer is sued for taking and detaining them. To this extent this rule may be a reasonable and proper one, but care must be taken not to apply it beyond those cases where such pointing out of specific articles may be reasonably required of the party. As it seems to us, the rule should not be applied here. The plaintiff held a general mortgage, which, in its terms, covered all the articles on certain premises named in the mortgage, with the further provision that the mortgage should also embrace "all other personal property" which the mortgagor might "put on said premises," etc. This last provision, though of no effect to pass subsequently acquired property (10 Metc. 481), might well be supposed by the plaintiff to have that effect; and a general claim made by him to all the property, under such mortgage, might not furnish any evidence of a design to mislead the officer. Under these circumstances, we think the plaintiff was guilty of no such nonfeasance in not pointing out the articles to which the mortgage did attach, and disclaiming all others, as should bar him of his right to recover for such of the articles as are now shown to belong to him.

Exceptions overruled.

FIRST NAT. BANK OF MARQUETTE et al. v. WEED et al.

(50 N. W. 864, 89 Mich. 357.)

Supreme Court of Michigan. Dec. 22, 1891.

Appeal from circuit court, Gogebic county, in chancery; William D. Williams, Judge.

Action by the First National Bank of Marquette and others against Alfred Weed and others. From the judgment of the court below complainants and several of defendants appeal. Modified and affirmed.

J. E. Ball and Ball & Hanscom, for appellants. Flower, Smith & Musgrave and Tomkins & Merrill (C. F. Button and Benton Hanchett, of counsel), for appellees.

LONG, J. The bill in this cause was filed for the purpose of declaring a certain bill of sale, given by A. Weed & Co. to Hoxie & Mellor, a chattel mortgage as security for certain accommodation paper made and indorsed by Hoxie & Mellor, and used by A. Weed & Co. in their business, and to decree the same to be a lien upon the logs described in said bill of sale, and the lumber and other material manufactured therefrom, and that the same be declared a trust fund for the payment of such accommodation paper; to declare the articles of agreement or sale by said A. Weed & Co. to the South Branch Lumber Company null and void as against said bill of sale given to Hoxie & Mellor; that the bill of sale be decreed to be a lien upon said property in the nature of a chattel mortgage prior to the purchase of the said South Branch Lumber Company; that a certain chattel mortgage held by the First National Bank of Ashland, Wis., be declared to be a lien subsequent to the lien of the complainants upon said property; and that the accommodation paper held by the complainants be first paid out of the proceeds realized from the sale of the logs. The bill asked for an injunction against defendants restraining them from interfering with, removing, or disposing of the logs, lumber, lath, shingles, or timber, and for the appointment of a receiver. Upon the hearing in the court below, a decree was made from which complainants and several of the defendants appeal. On November 28, 1889, A. Weed & Co., composed of Alfred Weed and Paul Weed, who were engaged in the business of getting out logs, manufacturing them into lumber, and selling the lumber, made with Hoxie & Mellor the following contract: "Antigo, Wis., Nov. 28, 1889. This agreement witnesseth that Hoxie & Mellor, in consideration of two promissory notes of A. Weed & Co., for $2,500 each, dated to-day, one due July 15th next, and one due Oct. 15th next, without interest, hereby agree to advance to A. Weed & Co. their notes for such amounts and at such times as will be necessary to carry on A. Weed & Co.'s business at Ramsay, and for the purpose of logging a certain four million tract at Ashland. Hoxie & Mellor also agree to indorse A. Weed & Co.'s notes for $14,000, for payment of purchase price of above four million feet of timber. It is agreed between both parties that the amount of notes advanced for Ramsay business shall not exceed $70,000 in all at any one time, and that the amount advanced for Ashland business shall not exceed $30,000 in all at any one time, including the indorsement of $14,000 for purchase price of timber. A. Weed & Co. agree to use Hoxie & Mellor paper at such places as will not interfere with the conducting of their (Hoxie & Mellor's) other business, and also agree that all notes shall be taken up by them before Dec. 31st, 1890, out of the proceeds of sales of stock. Hoxie & Mellor. A. Weed & Co." Under this contract notes were advanced by Hoxie & Mellor to A. Weed & Co., and renewals of such notes were made by Hoxie & Mellor up to April 5, 1890, amounting to $108,000.

On March 30, 1890, Paul Weed, who acted for A. Weed & Co., wrote to Mellor, who acted for Hoxie & Mellor, the following letter: "Ashland, Wis., March 30, 1890. Mr. E. W. Mellor, Antigo, Wis.—Dear Sir: We inclose the last $3,500 note for signature and return, as per my letter of recent date. We finished the last of our logging operations on April 2, and they have been very satisfactory. As fast as we market our lumber we shall retire the notes out, but that will not begin until June or July. We have arrangements to take care of our renewals in the meantime. I did not see Bishop but a few minutes, owing to a mistake, and we having a lawsuit on our hands the following day. Did he take the logs? Yours, truly, Paul Weed." To this letter Mellor replied by letter of April 5th, as follows: "Antigo, Wis., April 5, 1890. Paul Weed, Ashland, Wis.—Dear Sir: Your favor of the 30th ult. came while I was away; hence the delay in replying. I return the note herewith, as it is impossible for me to sign it under existing circumstances. Will explain more fully when I see you. Expected to see you ere this, and, if you are not coming down soon, let me know, and I will go up there, as I must see you ere long. I inclose you also your note which was renewed. Yours, truly, E. N. Mellor."

After receiving this letter, Paul Weed went to see Mellor at Antigo, and there executed to Hoxie & Mellor the bill of sale which complainants, by their bill, claim was intended as security for certain notes indorsed, and thereafter to be indorsed, by Hoxie & Mellor. This bill of sale is as follows: "Know all men by these presents, that A. Weed & Co., of Ramsay, Gogebic county, Michigan, of the first part, for and in consideration of the sum of seventy thousand dollars lawful money of the United States to me in hand paid, at or before the ensealing and delivery of these presents by Hoxie & Mellor, of the second part, the receipt whereof is hereby acknowl-

edged, have bargained, sold, granted, and conveyed, and by these presents do bargain, sell, grant, and convey, unto the said parties of the second part, their executors, administrators, and assigns, twenty-eight thousand pine saw-logs, scaling seven million feet, more or less. Said logs are now lying and being in the Black river, near Ramsay, Gogebic county, Michigan. To have and to hold the same unto the said parties of the second part, their executors, administrators, and assigns, forever. And we do, for our heirs, executors, administrators, and assigns, covenant and agree, to and with the said parties of the second part, to warrant and defend the same described goods, hereby sold unto the said parties of the second part, their executors, administrators, and assigns, against all and every person and persons, whomsoever. In witness whereof we have hereunto set our hands and seals the fifteenth day of April, A. D. 1890. A. Weed & Co. [Seal.] Signed, sealed, and delivered in the presence of George R. Fraser."

When this bill of sale was made the logs were where they had been banked. The driving of them had not commenced, and A. Weed & Co.'s men were on the ground preparing for the drive. They continued the work, and drove the logs. The drive started about the 17th of April, and was finished about the 4th of May. A. Weed & Co. began sawing the logs about May 5th, and continued sawing them until some time in September, when all the logs in controversy had been sawed. The bill of sale before set out was not filed until the 10th day of May, 1890. On the 11th of June following, A. Weed & Co. made a contract of sale to the South Branch Lumber Company of all the merchantable white pine lumber which had then been sawed from the logs, and all which they should saw from the logs, as follows: "Chicago, Ill., June 11th, 1890. South Branch Lumber Company, Chicago, Ill.: We will sell you all the merchantable white pine lumber now piled at our mill at Ramsay; also the lumber from logs now in Black river and tributaries, and to be sawed at our mill in Ramsay,—the entire cut being about seven million feet,—for the sum of $11 per M ft., board measure, f. o. b. cars at our mill. The 10 ft. c. and better to go in at the same price, and the 6 and 8 ft. c. and better at $10 per M feet. The mill culls, and 6, 8, and 10 ft. common and poorer, are not a parcel of this agreement. The lumber to be all cross-piled, and grades kept separate, as directed by you. We will also sell you our extra star shingles at $1.75, and the 6 dimension clear shingles at $2.20 per M, f. o. b. cars at Ramsay. Lumber to be settled for on the basis of $13 per M on McClintock's estimate, the first of each month, and you to give us your ninety-day paper for the same. The lumber to be manufactured from time to time as directed by you or your representative; and we shall take proper care in piling and covering same to prevent staining, and see that no lumber is piled nearer than 150 ft. of the mill, to protect you in insurance. When estimates are taken, each pile to be marked, 'The property of the South Branch Lumber Company.' We also agree to make good to you any expense or loss that you may be put to by any claims or otherwise made against this lumber by other parties. Final settlement to be made as per the price of $14 on the completement of the shipment of all the lumber. Lumber to be inspected by C. M. E. McClintock, each paying one-half of the same. We also agree to hold this lumber in piles until reduced in weight not to exceed 2,500 lbs. per M. ft. You also have the privilege of letting this lumber remain here as long as you wish, providing that it does not interfere with the necessities of our mill for piling room. Very respectfully yours, A. Weed & Co. We accept the above. The South Branch Lumber Co. B. F. Ferguson, Treas."

After this contract had been made, and the parties begun to act upon it, and to ship lumber under it to the South Branch Lumber Company, a further agreement was made that the South Branch Lumber Company should take the lower grade of lumber which should be piled in the piles of lumber made under the contract of June 11th, and this became a part of the contract. On September 6th the lumber which had been thus sawed, and which is the lumber in controversy between the complainants and the South Branch Lumber Company, was delivered into the possession of the defendant the South Branch Lumber Company, and continued in its possession until it was seized by attachment on September 16th and 17th. The lumber at this time had been estimated by McClintock. It appears that after the lumber had been estimated, and had been taken possession of by the South Branch Lumber Company, and on September 16th, in a suit by the First National Bank of Bessemer against Hoxie & Mellor and A. Weed & Co., the lumber was seized by attachment, and on the 17th of September it was again attached in a suit brought by the complainant the First National Bank of Marquette against Hoxie & Mellor and A. Weed & Co. On the 21th of September the South Branch Lumber Company replevied the lumber from the sheriff, who held it under these writs of attachment. The defendant the South Branch Lumber Company, upon its contract of purchase of the lumber in controversy from A. Weed & Co., executed and delivered to A. Weed & Co. its negotiable promissory notes to the amount of $58,000. These notes were made and delivered to A. Weed & Co., as follows: About June 21st, the sum of $25,000; August 1st, $18,000; September 1st, $15,000. The first payment was made upon the certificate of the inspector agreed upon in the contract. The last two payments were made without any

such certificate, or any inventory of Mr. McClintock, that being waived by both parties. All these notes have been paid by the South Branch Lumber Company. The complainants are the holders of a part of the notes made by A. Weed & Co. and Hoxie & Mellor under the contract of November 28, 1889. All such notes held by the complainants were made after the sale of June 11th by A. Weed & Co. to the South Branch Lumber Company. Some of these notes are renewals of notes made prior to that date. The complainants bought them in open market for a valuable consideration, and without knowledge of the existence of the bill of sale from A. Weed & Co. to Hoxie & Mellor, heretofore set out, given April 15, 1890. As the holders of these notes, the complainants claim by their bill to be subrogated to all the rights of Hoxie & Mellor under the bill of sale, with the right to foreclose the same as a chattel mortgage given to secure such notes. The issue between the complainants and the South Branch Lumber Company is whether, under the contract of June 11th, the South Branch Lumber Company has acquired such rights in the lumber that it could hold the lumber as against the foreclosure by the complainants of the bill of sale of April 15th.

Some considerable testimony was given to show what the agreement and understanding was between A. Weed & Co. and Hoxie & Mellor at the time the bill of sale was executed, which, taken with the bill of sale, would constitute a security, and what were the terms. The South Branch Lumber Company contends that when the bill of sale was executed it was the understanding and agreement between A. Weed & Co. and Hoxie & Mellor that A. Weed & Co. should continue in possession of the logs, drive them to their mill at Ramsay, manufacture them into lumber, sell the lumber, and, by means of the proceeds, pay the notes indorsed or signed, and to be indorsed or signed, by Hoxie & Mellor, and that Hoxie & Mellor would continue to indorse or renew notes for A. Weed & Co. to enable A. Weed & Co. to do that business; and that in doing that business A. Weed & Co. made sale of the lumber in question to the defendant by the contract of June 11th. It appears that $40,725 of the notes given by the South Branch Lumber Company was directly applied to the payment of the notes made or guarantied by Hoxie & Mellor, and by them given to A. Weed & Co., under their contract of November 28, 1889. The bill was filed in this cause October 1, 1890, setting up that the complainants were holders of the notes made or guarantied by Hoxie & Mellor for the accommodation of A. Weed & Co., and that the bill of sale was given for the purpose of securing Hoxie & Mellor against any loss they might suffer by reason of the failure of A. Weed & Co. to pay the promissory notes in accordance with the understanding of the parties, or to secure the several parties and persons by whom the said notes were purchased; and designated that all the property described in and covered by the bill of sale was to be and form a fund to secure the payment of such notes. The South Branch Lumber Company filed its answer and cross-bill, denying that the bill of sale was given either to secure Hoxie & Mellor or the notes; setting up the contract of November 28, 1889; alleging that the bill of sale was not intended to interfere with the manufacture of the logs into lumber, and the sale thereof; setting up that the sale to the South Branch Lumber Company by A. Weed & Co. was made with the knowledge and consent of Hoxie & Mellor; that $40,725 of the $58,000 which it had paid under its contract had been applied by A. Weed & Co. to the payment of the notes made by Hoxie & Mellor for the accommodation of A. Weed & Co., and which were outstanding on the date of the making of the bill of sale or given to renew notes then outstanding; setting up that A. Weed & Co., and all the members thereof, were residents of Ashland in the state of Wisconsin; that the larger part, if not all, of all the logs which the parties intended to cover by the bill of sale were in the township of Ironwood, in the county of Gogebic, at the date of the execution and delivery of said bill of sale, to-wit, the 15th of April, 1890; that the bill of sale was never filed in the township where the property was at the date of the execution and delivery thereof; and that the logs out of which the lumber in controversy had been manufactured were not in Black river, near Ramsay, on the date of the execution and delivery of the bill of sale. By way of cross-bill, the South Branch Lumber Company claimed that, the parties being before the court, the rights of all parties should be determined in this cause, and asked to have the further prosecution of the attachment and replevin suits enjoined and the bonds discharged. For the purpose of showing that the bill of sale was in fact intended as a chattel mortgage, Mr. Mellor, of the firm of Hoxie & Mellor, was called as a witness, and testified that on April 15th there were outstanding notes made or indorsed by Hoxie & Mellor for A. Weed & Co. in the sum of $108,000; that up to that time no security had been given; that this was all accommodation paper, and made for the accommodation of A. Weed & Co. He testified that Paul Weed called upon him at that date, April 15th, and wanted to renew this paper when it fell due. He was then asked: "Q. What did you say to that? A. I said to him that if he wanted to renew any more of that paper we wanted security. Q. What security did you get? A. Security on logs at Ramsay. Q. State what occurred in regard to the giving of the bill of sale, on or about the

15th of April, 1890. A. Paul Weed came down here to see me about renewing more of that paper, and I told him I was very sorry we had gone into that deal, and I did not want to renew any more without security. He asked me what security we wanted, and I told him we wanted a bill of sale of the logs there at Ramsay. He said, 'All right, you can have it.' I went out in the other room, and got a blank bill of sale, and filled it out, and he signed it, and signed the name of A. Weed & Co. * * * Q. Did this bill of sale contemplate the security of all paper that was outstanding at the time it was given, and any renewals that might be issued of such original paper? A. That was what the bill of sale was given for. It was for the security of the notes that were outstanding at the time, and any renewals of those notes. Q. Did you have any conversation with Paul Weed on that point,—about the renewal or securing renewals, etc.? A. I did have a conversation about that. Q. What did he say? A. He said that, of course, the bill of sale was given to secure any renewals that might be made. Q. Did you have any conversation with Paul Weed by which it was agreed between you that you were to renew any stated amounts of paper then outstanding? A. Yes, sir; we had. Q. State what that conversation was. A. He said he would probably want to renew most of the paper that was outstanding at that time. Q. Did you make any agreement with Paul Weed not to file this bill of sale? A. No, sir." The witness further testified that he afterwards filed the bill of sale in the town-clerk's office in the township of Bessemer, and that at the time of filing the logs covered by the bill of sale were in Black river, at Ramsay; that the head of the jam was at the mill at Ramsay, and that he understood the logs were in a solid jam; that A. Weed & Co. were doing business at Ramsay, operating a sawmill, manufacturing lumber, and were doing a logging business, and that their office was situate at Ramsay, and that they were also doing business at Ashland, Wis.; that after the bill of sale was given they renewed other notes, and some new ones were given, but that they were for renewals, though given for different amounts when they were renewed. The witness also testified to having received a letter from Paul Weed, dated May 24, 1890, in which Weed wrote him that he inclosed certain notes for renewal, and further stated: "Please sign or indorse, as the case may be, and send them back to me in inclosed envelope. We do not know yet whether we shall need to renew much in July or not. We expect we sold our Ramsay stock to-day; shall know next week. If we did, it will run into money fast. We send one other note of $3,000, to renew note of same amount due at Bank of Antigo, July 21. I hope we shall not have to trouble you much more. Everything running well with us. Yours, truly, Paul Weed." The witness further testified that he first learned of the sale made to the South Branch Lumber Company on July 3d, which was by letter; that he never authorized the sale, and never had any talk with A. Weed & Co. about it. The witness stated that, prior to this time, he signed the bond in certain attachment proceedings for A. Weed & Co. to get the logs restored to those parties, and that he expected them to proceed and manufacture the logs and sell the lumber; that they were to take care of the notes as fast as they could sell the lumber off; that, at the time he signed the bond to release the logs from the attachment, A. Weed & Co. had spoken of the South Branch Lumber Company as a possible buyer; and that at that time he entered no protest against A. Weed & Co. making a sale to the South Branch Lumber Company. The evidence shows that all the notes referred to were thus signed and indorsed by Hoxie & Mellor under the contract of November 28, 1889. Mr. Mellor, in making this contract, understood that the notes referred to therein were to be carried along by renewals of their indorsements until the fall of 1890, and that A. Weed & Co. by their contract agreed to take care of them till December 31, 1890, and that Hoxie & Mellor were to continue their indorsements until that time. No other arrangements were ever made in regard to these notes. Mr. Mellor also understood that the original agreement provided that A. Weed & Co. were to saw the logs and sell the lumber and take up the notes by that time.

It is evident from this testimony, and the interpretation which Mr. Mellor gave the contract, and his understanding of the arrangement between himself and Paul Weed, acting for A. Weed & Co., that the bill of sale was given to secure the performance by A. Weed & Co. of the contract of November 28, 1889. By the terms of this contract, which was not changed, or understood between the parties to have been changed, in any respect, A. Weed & Co. were to manufacture the logs into lumber, sell the lumber, and out of the proceeds take up the notes before December 31, 1890, and the bill of sale was given to secure Hoxie & Mellor for the faithful performance of this contract; and it is evident that it was the intention of the parties that, so long as A. Weed & Co. went forward and executed the contract, they would not be interfered with by Hoxie & Mellor, but that, should they fail to perform the contract according to these terms, then Hoxie & Mellor would have their remedy under the chattel mortgage to enforce performance. It is difficult to understand from the testimony of Mr. Mellor or of Mr. Paul Weed (which we have not set out here) how it can be claimed that Hoxie & Mel-

lor had a right under this bill of sale—which, by the arrangement between the parties at the time of its execution, was intended and understood as a security—to interfere with A. Weed & Co. in driving these logs to the mill, manufacturing them into lumber, and selling and disposing of the lumber for the purpose of taking care of these notes or renewals, when it must be conceded that they were to have until December 31, 1890, to pay and take up such notes, and the renewals thereof, by Hoxie & Mellor, who were to carry them along upon such renewals until that time. By the terms of the contract of November 28, 1889, A. Weed & Co. were to have until that time to pay and take up these notes. No change was made in that contract, and, by the testimony of Mr. Mellor himself, the chattel mortgage into which the bill of sale was converted by parol agreement was only intended to secure the performance of this contract. By the arrangement, then, between Hoxie & Mellor and A. Weed & Co. they were to have the right to manufacture and sell this lumber for the very purpose of meeting these notes. In this view of the case, A. Weed & Co. had the right to sell and convey on June 11, 1890, all of the lumber manufactured at their mill from these logs to the South Branch Lumber Company, and the claim of the South Branch Lumber Company would have priority over any claim which Hoxie & Mellor had under the bill of sale, or any claim which the complainants might have as the holders of these notes by way of subrogation. There is nothing upon the record to show that the South Branch Lumber Company had any notice or knowledge of the bill of sale held by Hoxie & Mellor. The only claim of notice to the South Branch Lumber Company is that the bill of sale was filed in the township of Bessemer, Gogebic county. It was executed on April 15 and filed May 10, 1890. A. Weed & Co. were non-residents of this state.

The question of the place of filing the mortgage does not become important in determining the rights of the South Branch Lumber Company. But in determining the rights of the defendant the First National Bank of Ashland, Wis., it does become important. About September 6, 1890, the firm of Hoxie & Mellor failed, and made an assignment for the benefit of creditors, Charles V. Bardeen, one of the defendants herein, being assignee. About the same time A. Weed & Co. became insolvent. On September 15, 1890, A. Weed & Co. assigned their contract with the South Branch Lumber Company to the First National Bank of Ashland, as security for notes to the amount of $56,130, held by said bank, including $41,130 of the said accommodation notes, the said bank to pay said indebtedness, and the surplus, if any, to A. Weed & Co., after paying expense of carrying out the contract. The First National Bank of Ashland held $41,130 of the said accommodation paper, $9,625 of which was discounted by said bank, May 3, 1890, and the remainder at sundry times from May 31 to August 13, 1890. On September 15, 1890, A. Weed & Co. also executed and delivered to the First National Bank of Ashland a chattel mortgage to secure said notes, amounting to $56,130, covering the logs and lumber in question, besides other property. At the same time other mortgages and securities were turned out to said bank, but not sufficient in value to cover the indebtedness.

The amount of the accommodation paper now outstanding and held by parties to this action is $86,232.50, some of which are renewal notes, the balance being notes discounted and the money used in whole or in part to pay up old notes. The First National Bank of Ashland paid out in the sawing and taking care of the property and carrying out the contract with the South Branch Lumber Company after it took possession under its assignment of contract and chattel mortgage, the sum of $11,804.11, and for taxes on the lumber $456.92. The particular parts of the decree to which the First National Bank of Ashland excepts are those which find: "That the lien of said bill of sale is prior to the lien of the said First National Bank of Ashland created by its said chattel mortgage dated September 15, 1890. * * * That the said First National Bank of Ashland, the First National Bank of Bessemer, and the complainants herein, excepting the First National Bank of Appleton, are entitled to share pro rata (provided, however, that the said First National Bank of Ashland shall first exhaust its other security obtained by it as security for the said notes and other demands) in the surplus that shall remain after satisfying the said sum so ascertained to be due to said bank as aforesaid, and for which it has a first lien. And that they shall so share, to the amount and extent only of the notes, respectively, held by them, and secured by said bill of sale of April 15, 1890, namely, notes then outstanding, signed or indorsed by Hoxie & Mellor for the accommodation of said A. Weed & Co., and renewals of said notes." The court having found that the bill of sale from A. Weed & Co. to Hoxie & Mellor was never recorded in Ironwood township, where the logs therein intended to be described were situated, and that the contract of the South Branch Lumber Company is prior to the lien of said bill of sale, the First National Bank of Ashland contends that it was error in the court to hold that the lien of the bill of sale is prior to the lien of the First National Bank of Ashland.

It is urged on behalf of defendants that

the bill of sale was void as to third parties, because the description did not cover the property intended to be conveyed, the bill of sale calling for logs "in the Black river, near Ramsay," while a large portion of the logs in question were not in the river, but in roll-ways on the banks of the river, and six miles from Ramsay. It is also contended that the mortgage was void as to the First National Bank of Ashland, for the reason that it was not filed in the proper town-clerk's office. It is conceded that the mortgage was never filed in the town-clerk's office where the logs were situate at the time the bill of sale was executed and delivered; that is, in the township of Ironwood. But counsel for complainants claim that the mortgage having been filed in the town-clerk's office of the town of Bessemer, and the logs having been floated into that township, and being in that town at the time the mortgage was filed, such filing was proper. Section 6193, How. St., provides: "Except when the mortgagor is a non-resident of the state, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township, or the city clerk of the city, or city recorder of cities having no officer known as 'city clerk,' where the property is." The same section requires chattel mortgages made by residents to be filed in the townships where the mortgagors reside. Under this statute there is but one place for the filing of a chattel mortgage when the mortgagor is a non-resident of the state, and that is the township or city where the property is, and the filing would not be constructive notice, unless so filed. It is plain that it is the intent of the statute that the filing should be in the township or city where the property is at the time of the execution and delivery of the mortgage, and not in some other township or city to which the property may be removed after such execution and delivery. It was the intent of the legislature to fix a rule by which all mortgages should be filed and by which all must be governed. This precise question has never, until the present occasion, been before this court. In many of the states it is provided by statute that, in case of non-resident mortgagors, the filing shall be in the township or village "where the property may be at the time the mortgage is executed." The statute of Massachusetts formerly provided that a chattel mortgage should be recorded where the mortgagor resided "at the time of making the same." By a revision of the statute, the words, "at the time of making the same," were omitted. In Witham v. Butterfield, 6 Cush. 217, the court of Massachusetts, speaking of this omission in the revision, said: "This latter clause has been stricken out in the Revised Statutes. Whether this was done for precision merely, or was intended to change the law in a material point, is left wholly in doubt, and has rendered that uncertain which was before certain." The point was not decided; but the court, even when the statute had been changed, was doubtful if it were not done simply for precision. Under our statute no such doubt can arise. This statute has been carried upon the statute books for a great many years, and no one has ever doubted that the time of the execution and delivery of the mortgage fixes and determines the place where such mortgage must be filed.

We need not discuss the other questions raised by counsel, as this must be decisive of the rights of the complainants and the First National Bank of Ashland. The bank and its officers had no actual knowledge of the execution of this bill of sale which we have denominated the chattel mortgage, and the filing in the township of Bessemer cannot be construed as constructive notice. The order and decree of the court below were substantially: (1) That the bill of sale was given to secure the payment of the notes, and all renewals thereof, but that it was not valid as against the South Branch Lumber Company, because not filed in Ironwood township, where the logs were at the date it was given, but not at the date it was filed. (2) That the contract between the South Branch Lumber Company and A. Weed & Co., of June 11, 1890, was an executory contract for the purchase of lumber upon which the South Branch Lumber Company had advanced $58,000. (3) That the lien of the bill of sale is prior to the mortgage to the First National Bank of Ashland. (4) That the First National Bank of Ashland was entitled to be reimbursed to the amount of $11,000, for money expended in protecting and manufacturing the lumber, and a reference is ordered to ascertain whether it is entitled to more. (5) That the First National Bank of Ashland, the First National Bank of Bessemer, the Security Savings Bank of Ashland, and the complainants are entitled to share pro rata in the security, after the First National Bank of Ashland shall exhaust its other security, except that the First National Bank of Appleton is not entitled to participate. (6) That a receiver be appointed, that the lumber be sold, and that the contract with the South Branch Lumber Company be carried out, and that the receiver settle with the South Branch Lumber Company therefor. (7) That a reference be made to ascertain the damages to the South Branch Lumber Company on account of this injunction.

The South Branch Lumber Company is entitled to hold all that its contract called for with A. Weed & Co., and is in no manner affected by the bill of sale of complainants, or any claim which the First National Bank may assert. The First National Bank of Ashland, after that, is entitled to have its claim allowed for moneys advanced in car-

rying on the business of A. Weed & Co.; and its claim under its chattel mortgage is held prior to any claim which the complainants may assert under the bill of sale to Hoxie & Mellor. The appointment of a receiver is confirmed, and he shall settle with the parties from the proceeds of the sales in accordance with this opinion. The South Branch Lumber Company will recover its costs against complainants. The First National Bank of Ashland will also recover its costs against the complainants. The decree of the court below must be modified in accordance with this opinion.

CHAMPLIN, C. J., and MORSE and McGRATH, JJ. concurred. GRANT, J., did not sit.

WELCH v. SACKETT et al.
(12 Wis. 243.)

Supreme Court of Wisconsin. June Term, 1860.

Error to the circuit court, Dane county.

The plaintiffs below, who composed two firms doing business under the names, respectively, of Sackett, Belcher & Co. and Widdefield, Cohn & Co., sued the defendant Welch for trespass in taking and carrying away from a building occupied as a store by one Harding certain goods, alleged to belong to the plaintiffs.

The answer was: (1) A general denial. (2) As to a part of the goods, particularly described, that the defendant took the same as the agent of J. Dahlman & Co., by virtue of a mortgage executed to them by said Harding, and filed on the 18th of December, 1858, in the office of the clerk of the city of Madison, where said Harding resided; and as to the residue of said goods, that the defendant seized the same on the 23d of December, 1858, by virtue of sundry writs of attachment against the property of said Harding duly issued out of the circuit court of Dane county on that day, and delivered to the defendant as sheriff of said county, to be executed; that said goods were, at the time of said seizure, the property of said Harding; that the plaintiffs claim to be the owners of said goods by virtue of two mortgages, bearing date December 20, 1858, purporting to be executed by said Harding,—one in favor of Sackett, Belcher & Co., and the other in favor of said Widdefield, Cohn & Co.,—but that said mortgages were made by said Harding, and filed without the request, assent, or knowledge of the plaintiffs; and that at the time of said seizure said mortgages had not been delivered to the plaintiffs, or either of them, nor to any agent or attorney authorized by them to receive the same, nor had they any knowledge that the same had been executed, or ever assented to or ratified the same. The defendant further alleged in his answer the rendition of judgment against said Harding on the 26th of January, 1859, in each of the actions in which said warrants of attachment were issued, the issuing of executions upon such judgments, the sale of the property attached, and the application of the proceeds first to the satisfaction of the mortgage to Dahlman & Co., and the residue, pro rata, upon said executions.

The principal question in controversy between the parties was whether there had been a delivery of the mortgages to the plaintiffs prior to the levy of the attachments. Upon the trial of the cause the plaintiffs gave in evidence three notes executed by said Harding, one dated August 11, 1858, payable to Widdefield, Cohn & Co. for $278.62, at six months after date; and two dated August 9, 1858, payable to Sackett, Belcher & Co., one for $815.48, at four months after date, and the other for $659.10 at six months after date, —and also two mortgages upon all the goods, etc., described in the complaint, made by said Harding, one to Widdefield, Cohn & Co., and the other to Sackett, Belcher & Co., for the security of the notes held by them respectively, each of which mortgages bore date December 20, 1858, and contained a clause authorizing the mortgagees to take possession of the goods whenever they should deem that their interest or the safety of the debt required it. The defendant objected to the introduction of the notes and mortgages in evidence, upon the ground that they showed that the plaintiffs had not a joint interest in the goods described in the complaint; but the court overruled the objection, and the defendant excepted. The defendant admitted, for the purposes of the trial, that on the 23d day of December, 1858, he took and carried away the goods described in the complaint. The proof as to the execution of the mortgages under which the plaintiffs claim title was substantially as follows:

Harding, the mortgagor, testified that the mortgages were executed by him in Madison, on the 20th of December, 1858; that the plaintiffs resided in the city of New York, and were not present at the time of making the mortgages; that the witness employed Mr. Haskell, an attorney, to draw them up, and paid him for them; that the plaintiffs did not know of the making of the mortgages until a letter could reach them; that he told the firm of Collins, Atwood & Haskell to write to all the parties to whom the mortgages were given; that at the time the defendant took the goods under the attachments, on the 23d of December, the witness had not heard from the plaintiffs; that a letter cannot go to New York and back in three days; that the debts for which the mortgages were given were all honest and bona fide; that at the time of the execution of the mortgages to the plaintiffs he executed another upon the same goods to Swift & Co., who afterwards gave up the mortgage, and had an attachment levied on the goods, and another mortgage to Phelps, Bliss & Co., which has been paid; all the mortgages amounting to $6,000 and upwards, and the mortgaged property being worth between $2,100 and $2,200, at retail prices, at Madison.

Mr. Haskell testified, in substance, as follows: "I drew the chattel mortgages from Mr. Harding to the plaintiffs on the 20th day of December, 1858. They were made in our office. After they were signed, I attached the schedules, and then handed the mortgages to Mr. Harding, and said to him: 'Here, Mr. Harding, are your mortgages. They are now at your disposal.' Mr. Harding then said: 'I suppose they must be delivered, must they not? I deliver the mortgages to you for the mortgagees.' And then he delivered them to me. He also requested me to notify the New York creditors that he had executed these mortgages to them, and to see that they were filed. I handed the mortgages to George E. Woodward, and requested him to carry them to the city clerk's office, and see that they were

filed. The mortgages read in evidence are the same mortgages. We wrote to the mortgagees on the 22d of December, 1858, informing them of the making of these mortgages, and on that day I deposited in the post office at Madison the letters, postpaid, directed to the creditors in New York. I gave the mortgages to Woodward to file, because it was time for me to go to dinner, and I thought it would make no difference who carried them to the clerk's office. Woodward is the son-in-law of Harding. I acted as the attorney of Harding in drawing these mortgages. In reply to his question asking if they must not be delivered, I told him it would be a sufficient delivery of the mortgages if he put them on file in the city clerk's office, and told the clerk what they were for, and wrote to the mortgagees; or that, if he chose, he might deliver them to me, and that I would see them filed, and notify the mortgagees. When he delivered the mortgages to me, he said, 'I deliver them to you for the mortgagees,' or possibly, instead of the word 'mortgagees' he used 'creditors,' or 'them'; but some word meaning the same thing. I saw the letter that my partner, Mr. Atwood, wrote to Swift & Co. The ones that I wrote were substantially the same. He wrote two of the letters and I wrote two. I did not advise Mr. Harding that, in order to render the mortgages valid to the creditors, they must first do some act to accept them. I advised Harding to make a delivery of the mortgages, because I understood that a delivery was essential to their validity, but I did not advise him to appoint me the agent of the mortgagees. Up to the time of delivery, I was acting for Harding, and the New York creditors had not employed me to act for them."

George E. Woodward testified that at the time the mortgages were executed Mr. Haskell, in the presence of Mr. Harding, requested witness to file the mortgages, and he took them to the city clerk's office a little after noon of that day, and filed them.

Mr. Harding, being recalled by the plaintiffs, further testified as follows: "I delivered the chattel mortgages which have been introduced in evidence to Mr. Haskell, for the use of the mortgagees. I asked Haskell if it was not requisite to deliver them, and he said I might deliver them to the city clerk, or to him for them. Then I handed the mortgages to Haskell, and said, 'I deliver these to you for the mortgagees.' I never have had or controlled the mortgages since that time, and have never seen them since until I saw them here."

The defendant read in evidence a letter from Messrs. Collins, Atwood & Haskell to Swift & Co., of New York, dated December 22d, 1858, in which, after informing them that Mr. Harding had, on the 20th instant, executed four chattel mortgages of even date, on his stock, to the four New York firms hereinbefore mentioned, they say: "Mr. Harding is confident you will ratify the proceeding, and he is now professing to act as your and their agent, and keeping the funds arising from sales apart, for the purpose of applying them pro rata in payment of the claims of the above named houses. An acceptance of the security given, would not, of course, bar your right to assert your whole claim. We would therefore suggest that some action be taken by you to avail yourselves of the mortgage security. We have written a like letter to each of the above firms." The defendant also proved the execution of the chattel mortgage to Dahlman & Co., referred to in the answer, and also the several warrants of attachment, judgments, and executions mentioned in the answer, and that he levied upon and sold the goods, etc., by virtue of said writs, as in the answer alleged.

After the testimony was closed, the defendant's counsel requested the court to give the jury the following instruction: "If the jury believe from the evidence that Harding made the mortgages read in evidence by the plaintiffs in the absence and without the knowledge or consent of the plaintiffs at the time of the execution thereof, and that they were not delivered to some of them, or some person authorized by the plaintiffs to act for them, then the plaintiffs cannot recover in this action, unless they have also proven that they did some act approving and ratifying the delivery of the mortgages to Mr. Haskell, before the defendant made the levies under and by the attachment in his hands;" which instruction the court refused to give in terms, but did qualify the same as follows: "But if you find that the mortgages were delivered to a third person for the sole use and benefit of the mortgagees, then the assent of the mortgagees will be presumed or implied, if you find that the mortgages were beneficial to them, and it is a sufficient delivery." The defendant also asked the court to instruct the jury as follows: "The placing of the mortgages read in evidence by the plaintiffs in the office of the city clerk, by the said Harding, or his agent or attorney, without the knowledge of the plaintiffs, and without any direction or intimation to said clerk by Harding or his agent or attorney so placing them on file that the mortgages were placed on file to remain there under his charge for the use and benefit of the mortgagees, is not such a delivery and filing of said mortgages as will entitle the plaintiffs to hold the goods mentioned therein against creditors attaching before the plaintiffs had knowledge of the making of said mortgages, or had ratified the acts of Harding or his said agents;" which instruction the court refused to give in terms, but qualified the same by adding thereto as follows: "Unless you find that the mortgagor, Harding, caused the mortgages to be so filed with the intention of a full delivery of the mortgages in this way, and for the sole benefit of the mortgagees." The defendant's counsel also asked the fol

lowing instructions: "If the jury believe that Harding was entitled to the possession of the goods mentioned in said mortgages at the time the defendant made the levy upon them by virtue of an attachment against the goods of Harding, then the plaintiffs cannot recover;" and: "Although the jury should believe that the mortgages were valid between Harding and the plaintiffs, yet, if Harding was entitled to the possession of the goods at the time of the levy by the defendant, then the defendant was authorized by the attachment in his hands to take possession of the goods, and hold and sell the interest of Harding therein, and this defendant is not liable to the plaintiffs in this action,"—which instructions the court refused to give in terms, but did qualify the same as follows: "Unless you find that the plaintiffs, at the time of the commencement of this suit, were entitled to the possession of this property, or were the owners thereof. In this state the mortgagee of chattel is entitled to the possession at any time after the execution of a mortgage, unless it is stipulated that the property shall remain in the possession of the mortgagor."

To the refusal of the court to give the said instructions in the terms asked for, and to the said qualifications attached thereto, the defendant excepted.

The defendant also asked the court to instruct the jury that if the plaintiffs, on the 23d day of December, 1858, and before the levy of the attachment by the defendant, were not in possession of the goods mentioned in the mortgages, they could not recover in this case; which instruction was refused, and the refusal excepted to. The court, in its general charge, instructed the jury as follows: "The question whether the mortgages were delivered to the mortgagees before the levy of the attachments is one of some difficulty. If they were not delivered before the levy, they are of no avail in this suit. They do not become effectual for any purpose until delivered. Upon this question I charge you that, if you find that Harding, the mortgagor, executed the mortgages, and delivered them to Mr. Haskell with the direction to place them on file in the city clerk's office for the use and benefit of the mortgagees, and that such was the declared intention of the mortgagor, and that they were so filed in the city clerk's office before the levying of the attachments, it was a good and valid delivery of the mortgages, even though the mortgagees themselves had no knowledge thereof, and had given no direction concerning such mortgages until after the attachments in this case were levied upon the property. If you find that the mortgages were made in good faith, and were so delivered and filed in the city clerk's office before the levy of the attachments, the plaintiffs are entitled to recover," to the giving of which instruction the defendant also excepted. The jury found a verdict in favor of the plaintiffs for $1,860, and judgment was rendered thereon.

Smith, Keyes & Gay, for plaintiff in error. Collins, Atwood & Haskell, for defendants in error.

DIXON, C. J. The first question involved in this case, I think, was correctly decided. It seems to me clear that the concurrent execution and delivery of the two chattel mortgages made the mortgagees tenants in common of the property conveyed. The legal effect was the same as it would have been if the goods had been mortgaged to them by one instrument, to be held by them as security for their respective claims, and the proceeds in case of a sale to be divided between them in proportion to the amounts thereof severally. If an absolute sale of a chattel were to be made at one and the same time to two different persons, by instruments in writing, purporting to convey the whole of it, executed and delivered to each at the same moment, each having a knowledge of the sale to the other (a transaction, perhaps, not likely to happen, but nevertheless not impossible), I imagine that we should find little difficulty in saying that the vendees thereby became tenants in common, each holding an undivided moiety of the article purchased. Neither having any superior right or equity, but both standing on an equality in those respects, the property would be divided. The same would be true of conveyances of real estate under the same circumstances. It can make no difference that the sales or conveyances are conditional. Their effect in this respect is the very same, except so far as the interests of the several vendees or mortgagees are limited and determined by the amount of the demands due to each. The defendants in error (plaintiffs below) were, therefore, not only enabled, but it was incumbent upon them, provided the plaintiff in error so insisted, to join in their action. Hill v. Gibbs, 5 Hill, 56.

The second question has been determined adversely to the plaintiff in the case of Frisbee v. Langworthy (decided at the present term) 11 Wis. 375. We there held that a mortgagee of personal property, not in actual possession, might maintain replevin against a person taking the same in defiance of his right, where, by the terms of the mortgage, he was entitled to take possession whenever he deemed that his interest or the safety and security of the debt required. Such was the case of the present mortgagees.

The question which was considered by far the most important, and upon which the counsel bestowed the most attention, citing nearly all the English and American authorities, calls for the determination, in a case where a mortgage of personal property from a debtor to a creditor is executed in the ab-

sence and without the knowledge of the latter, and delivered to a stranger for his use of the time at which the title to the property mortgaged vests in the mortgagee, as between him and another creditor of the mortgagor who acquired an interest in it by attachment between the time of the delivery to the stranger and the time when the mortgagee actually received notice of and accepted it. Whilst it must be admitted that there is some conflict in the adjudications upon this subject, still both natural reason and the weight of authority tend to the same conclusion, which is, that the title in such case only vests from the time there is an acceptance in fact on the part of the mortgagee. On principle, I think it may be laid down as an indubitable proposition in such case that the title does not vest in fact until the mortgagee has actually assented to the conveyance; and, consequently, that until such assent it remains in the mortgagor. While all the courts acknowledge the correctness of principles which lead unerringly to this result, and clearly and positively exclude any other, it is somewhat strange that any should have been found to adopt a conclusion directly opposed to it. All agree that it is necessary to the validity of every deed or conveyance, that there be a grantee who is not only willing, but who does in fact, accept it. It is a contract, a parting with property on the part of the grantor, and an acceptance of it by the grantee. Like every other contract, there must be a meeting of the minds of the contracting parties, the one to sell and convey and the other to purchase and receive, before the agreement is consummated. If there be anything in legal principles, or in common sense, it is an unpardonable absurdity to say that a contract can be completed in the absence and utter ignorance of one of the contracting parties; that he can or does, under such circumstances, assent to or agree to become bound by it. The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him, without any motion or act of his signifying his willingness, but merely by his refusal to receive it at all, had its origin at a period in the history of the common law when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by a mysterious and fanciful logic, that depended for its support upon artfully devised fictions and falsehoods which for the most part were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done is, I believe, attributable to the inventive skill of Justice Ventris, as exhibited in the case of Thompson v. Leach, 2 Vent. 198, decided about the year 1690. At least several courts and judges since that time, with many complaints, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is that a deed of lands made to a party, without his knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him the instant the deed is parted with by the grantor; and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter. Inasmuch as this is the only attempt at sustaining it by argument to be found in the books, the more recent cases having, without discussion, gone off almost entirely on the strength of the authorities, I propose to examine some of the positions assumed by him, upon which his argument mainly depends, and from which, I think, its fallacy and the incorrectness of his conclusions will be clearly made to appear. He admits, what is universally conceded to be an indispensable element of every grant, namely, that it should be accepted by the grantee; and says "that an assent is not only a circumstance, but it is essential to all conveyances, for they are contracts, actus contra actum, which necessarily suppose the assent of all parties"; but avoids the difficulty into which the admission of this well-settled principle brings him, by saying "that because there is a strong intendment of law that for a man to take an estate is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage," therefore the law will presume that the grantee has accepted a conveyance before a knowledge of its execution and delivery has come to him. Upon the foundation of this hypothesis, misnamed by him a presumption of law, the falsity and unreasonableness of which are so self-evident that reasoning can hardly make them plainer, he proceeds to the erection of his superstructure. Assent or acceptance on the part of the grantee or other party to a deed or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a fact, the truth of which is to be established by competent evidence, before such deed or other instrument can be adjudged to have a legal existence. Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. But I deny that the existence of one fact is to be inferred or presumed from the existence of others when the connection between the former and the latter is such that, according to the course of nature, it plainly appears that the former cannot exist. In other words, I deny that the existence of any fact may be shown by

proving others which conclusively show its non-existence, or that the legitimate mode of establishing the truth of a matter is by indubitably proving its falsehood. Justice does not require, nor does the law tolerate, such an absurdity. The learned justice says that, where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, without the previous advice, direction, or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it the moment it is delivered to the stranger. Assent is an act of the mind,—that intelligent power in man by which he conceives, reasons, and judges, and of which it is a primary, invariable, and most familiar law that it cannot act with reference to external objects, until through the medium of the senses, it is impressed with or knows their existence. Hence, without such impression or knowledge, there can be no assent, no actus contra actum; and to presume it in opposition to the facts is to presume that which is impossible, which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do.

"A presumption," says Mr. Starkie, "may be defined to be an inference as to the existence of one fact from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that, as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject." Presumptions thus defined, he says, are either legal and artificial or natural, and may be divided into three classes: (1) Legal presumptions made by the law itself, or presumptions of mere law; (2) legal presumptions made by a jury, or presumptions of law and fact; (3) mere natural presumptions, or presumptions of mere fact. The definition which he so clearly and accurately gives, although applied by him to all presumptions, is perhaps more strictly applicable to the latter class. The assent to a deed or other instrument by the grantee or other party, being a matter of mere fact, it is obvious that to the latter class also would belong a presumption in relation to such assent, in a case where such presumption could properly be indulged. But, whether the presumption be assigned to the one or the other of these classes, the position of the learned justice is equally untenable; for in no instance, not even the most artificial and arbitrary, does the law indulge in presumptions which are directly contradicted by the facts on which they are predicated. The known facts, though often insufficient, of their own natural force and efficacy, to generate in the mind a conviction or belief of those which are inferred, are always, to say the least, not inconsistent with or opposed to them. If, for example, we take the case instanced by Mr. Starkie, of the presumption of the satisfaction of a bond after the lapse of twenty years, without payment of interest or other acknowledgement of its existence, while, if a single day less than the twenty years has elapsed, such presumption does not arise, we find it to be extremely arbitrary and technical. No natural reason can be given why the lapse of the last day should operate to produce in our minds a conviction of belief of payment, while the lapse of all the days and years preceding it does not so operate. Such is not its effect. But as, from common experience of the affairs of men, there arises in the mind, after the lapse of many years without payment of interest or other acknowledgement a strong probability that a debt has been satisfied, and as the law loves certainty and industriously avoids doubts, it has from these motives arbitrarily fixed a period of time at the expiration of which this probability shall ripen into and take effect as a presumption of law, and at which the rights and position of the parties in reference to such debt, flowing from the mere lapse of time, unaccompanied by other circumstances, shall become determinate and certain. This presumption which is in so many respects artificial, is in no respect inconsistent with the fact from which it is said to arise. On the contrary, though not conclusively sustained, it is strongly corroborated by the fact; since experience teaches that it is very improbable that the holder of the bond would, unless it were satisfied, permit such a space of time to elapse without receiving the interest or obtaining from the maker some other evidence of its non-payment. The same is true of that most purely artificial presumption that a bond or other specialty was executed upon a good consideration, which is so peremptory and absolute in its nature that it cannot be rebutted by evidence; whilst the consideration of another instrument, executed and delivered under precisely the same circumstances, and in the same words, but not under seal, may be freely inquired into and impeached; yet there the conclusion that it was made upon a good consideration is entirely consistent with the facts from which it is drawn, for there is much reason for supposing that without a good consideration it would not have been sealed and delivered. Without multiplying illustrations, I think it will be found that in no instance (unless the present case is to form an exception) does the law infer the existence of facts in clear and direct opposition to those upon which the inference rests. It does not do so here. Reason rebels against it, and neither justice nor equity demands it. The only result of dropping the absurdity will be that, as in the present case, in a contest between two equally meritorious parties, the title to the property of

which a conveyance was sought to be made will be adjudged to be in him whom reason designates as the true owner.

The mistake of the learned justice consisted in his carrying the presumption of law so far as to say that it presumes that a person has consented to that of which he knows nothing, which is an impossibility, instead of saying, what was more truly said by the more logical and cautious courts and judges of his time, and by Lord Ellenborough, in Stirling v. Vaughn, 11 East, 623, namely, that, if nothing appears to the contrary, the law presumes that he will accept that which is for his benefit, when he is informed of it, which assent, in the absence of intervening rights or equities will have relation back to the time of delivery for his use, and make his title good as from that date. After a brief argument of this sort, he proceeds to say "that very odd consequences and inconveniences would follow if surrenders should be ineffectual till an express consent of the surrenderee," and that most disastrous effects upon estates and conveyancing in England would ensue, unless her courts adopted and upheld his absurdity. It is said that one error surely gives rise to another and a greater. This saying was never more aptly and forcibly illustrated than by the fantastic feats which the learned justice makes the common law, the sober common sense of ages, perform by way of getting the title back again into the grantor in case the grantee refuses to accept the conveyance. He says that after, by this kind of one-sided contract, it has got into him without his knowledge, it remains with him without his consent until he absolutely rejects and spurns the offer; and that then, by some magical power of the law, such rejection, without deed or other writing, becomes an instrument of conveyance, by which the legal title to land is conveyed from one who has it to one who has it not, against the express wishes of the latter, and in despite of his own deed, the highest and most solemn act known to the law by which he could rid himself of it. It is not surprising that the learned and logical Chief Justice Gibson, in Read v. Robinson, 6 Watts & S. 329, while commenting upon what he calls "the masterly arguments of Justice Ventris in Thompson v. Leach," says that "the difficulty is to comprehend how the remitter can take effect without displacing intermediate interests springing from the rejected deed"; and then, as if in despair of ever comprehending it, he dismisses the subject from his mind by saying, "But the authorities conclusively prove that it may." All agree that neither the grantor nor the stranger who consents to receive and hold the deed can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in the grantee at once, it must, of course, vest according to the terms of the conveyance; and in the case of an absolute conveyance he would have an absolute title. If, after delivery to the stranger, and before notice to the grantee, a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee, it follows, as of course, that the creditor would have his right, and that he would at once acquire a lien to the extent of his demand. Suppose, after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does the refusal unbind and set the property free from the seizure of the creditors, and remit the title at once back to the grantor? Or does the intendment of Justice Ventris step in in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might at some future period accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor, by which means it would happen that, although it was neither bought nor sold, the grantor would, without consideration, lose it, and the grantee enjoy the full benefit of it on the same terms? Knowing of no rational or satisfactory answers which can be given to these and various similar questions which will readily suggest themselves to the reader, I leave them to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken, or other act of transfer, be thus mysteriously passed and repassed between parties by contract. I deny that it may be. It seems to me very plain that it does not pass in fact until the grantee has actually consented to receive it, and as of course that it remains with the grantor, who is unable without such consent to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give it validity. The justice assumed the question in controversy by saying that the execution and delivery of the deed to the stranger passed the title out of the grantor, and then he was under the necessity of resorting to these further absurdities in order to account for it; for he says "that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed," and not "under such uncertainty as a stranger that demands right should not know where to fix his action." If he had considered that the operation of the deed was suspended, or that it did not take effect until the grantee had assented, he would have been saved the trouble of drawing so largely on his imagination to show where the title was, and how it was thereafter to be controlled. It is a matter of no small moment, and of just pride to the bench of England, that Justice

Ventris, at the time he wrote this wonderful argument, dissented, and the other members of the court of common pleas, viz. Pollexfen, chief justice, and Powell and Rokeby, associates, were of opinion in the case "that there was no surrender till such time as the surrenderee had notice of the deed of surrender and agreed to it," and that it was so adjudged by that court; and that the case was afterwards taken by writ of error to the king's bench, of which Lord Holt was at the time chief justice, and the judgment of the common pleas "was there affirmed by the unanimous consent of the whole court." It was afterwards brought by error into the house of lords, where, as it is said, upon the reasons contained in Justice Ventris' argument, the judgment pronounced in both superior courts was reversed. Thus we have on the one side the legal learning, and almost the unanimous opinion, of the courts, and on the other the judgment of reversal of the house of lords, the great majority of whom knew very little, and cared less, about the correct settlement of legal principles.

The argument is of a piece with that kind of reasoning once employed to prove that titles to estates were "in abeyance," "in nubibus," and "in gremio legis," the folly of which is so thoroughly exposed and exploded by the severe and searching logic of Mr. Fearne in his admirable treatise on Remainders. See pages 360 to 364, inclusive. It was held, in case of a lease to one person for life, remainder to the right heirs of another still living, that no estate remained in the grantor; and, because there was no heir, for the reason that no one can be heir during the life of his ancestor, but only after his death, and because the tenant took only a life estate, the remainder was said to be in abeyance, in the clouds, or in the bosom of the law. These opinions were founded upon the very same assumption as that of Justice Ventris, namely, that the remainder passed out of the donor at the time of livery, and consequently that no estate remained in him thereafter; and, because the title must always be somewhere, the advocates of the doctrine sent it to the clouds, "though," says Mr. Fearne, "by some sort of compromise between common sense and the supposition of an estate passing out of a man, when there is no person in rerum natura, no object beside hard and hardly intelligible words, for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor as upon the determination of the estate before the contingent remainder can take place entitles the grantor, or his heirs, to enter and reassume the estate."

The questions are so closely allied, and the substrata of the two follies are so exactly alike, that Mr. Fearne's reasoning is fully in point. And it is certainly refreshing, after a perplexing and vain effort to understand that which never was and never will be intelligible, to take up an author, who, like Mr. Fearne, treats the subject upon the principles of common sense. He intimates a conviction that, instead of the title to estates being in the clouds, there is a much stronger probability of caput inter nubila condit, of the head of the inventor of the fiction having been buried or hidden in them. He says: "I cannot but think it a more arduous undertaking to account for the operation of a feoffment or conveyance in annihilating an estate of inheritance or transferring it to the clouds, and afterward regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles as well of common law as of common sense, a suspension of the complete, absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence." The same is true of the delivery of a deed to a third person for the use of the grantee, without his knowledge or previous direction. It is far more compatible with common law and common sense to say that its operation is suspended until the happening of the event indispensable in the law to its validity, namely, an acceptance by the grantee, than to make the law perform the wonderful exploits of vesting and recalling the title contrary to its best settled and soundest principles. I am of opinion, therefore, that the defendants in error took no interest in the goods in question by virtue of their mortgages, until after the plaintiff in error had seized them upon process of attachment, and, consequently, that they cannot maintain their action.

Much was said in this case, about the manner in which the mortgages were delivered. There can be no doubt that, so far as the mortgagor was concerned, the delivery was good. They were placed by him in the hands of a stranger, to be by him delivered to the mortgagees, and thus passed beyond his reach and control, unless the mortgagees, within a reasonable time after notice, should refuse their assent. This made the delivery, as to the mortgagor, valid and binding, which is all I understand the author of the Touchstone to mean, when he says that a deed "may be delivered to any stranger for and in behalf and to the use of him to whom it is made." But a delivery by the donor to a third person, for the use of the donee, and an acceptance by the latter, are two very different things. By the former the donor signifies his willingness to part with the property, whilst by the latter the donee makes known his assent to receiving it, and both must concur before the title is changed or affected. It was formerly, and may perhaps by some be still, supposed, that there can be no delivery without at the same time an acceptance; that they are correlative, inseparable parts of the same

transaction, and must both occur at the same instant of time; and hence, in part, the fiction of relation, by which, in case of a delivery by the grantor to a stranger, the subsequent acceptance by the grantee was carried back in legal contemplation to the time when the grantor gave the deed to the stranger, in order to save the logic of the law and to preserve "the eternal fitness of things." It seems to me that every case in which it has been adjudged that there may be a delivery to a stranger, and that a subsequent ratification by the grantee will make the instrument effectual for the purposes intended, falsifies this notion, and proves that in every such case there may be, what there is in fact, a delivery by the grantor at one time to a third party, and an acceptance by the grantee from such third party at a subsequent and different time. Such is the common sense of the transaction; and it is better and more rationally disposed of without than with the aid of the fiction. But if the fiction must be employed, then the maxim, "In fictione legis semper subsistit æquitas," applies, and it will not be allowed to operate when it infringes or violates the rights of strangers. It is only resorted to in furtherance of justice and to prevent injury. In this case the plaintiff in error is a stranger to the mortgages. He represents the rights and interests of the creditors of the mortgagor, who in good faith sued out and levied their attachments upon the goods, thereby lawfully acquiring a lien upon them; and it cannot be said to be in furtherance of justice to postpone their demands, thus legally secured, to those of the mortgage creditors, which are in no sense more equitable or just. The struggle is between innocent persons, to prevent loss, and the fiction ought not to be resorted to for the purpose of helping one as against the other. The transaction must be left to stand upon its simple and naked truth.

It is unnecessary for me particularly to refer to the cases cited by counsel. Those cited for the plaintiff in error in their principles substantially sustain the views which I have taken. Many of those cited by the counsel for the defendants in error are not directly applicable, whilst some of them clearly and positively uphold the opposite doctrine. Of this latter character, besides the English, are Buffum v. Green, 5 N. H. 71; Wilt v. Franklin, 1 Binney, 502; and Merrills v. Swift, 18 Conn. 257. In the first it does not clearly appear whether notice of the execution of the deed or the service of the process of attachment took place first. Both happened on the same day, but the court seem to adopt the theory that the title vested before notice to the grantee, and therefore the time of the service of the writ, being immaterial, is not particularly noted. The principle upon which the doctrine rests is not discussed at all. The same is true of the case in 18 Conn. In both it is taken for granted that such is the effect of a delivery to a stranger. In Wilt v. Franklin there was a dissenting opinion of Justice Brackenridge, in which the fallacy of the reasoning of his two associates is so calmly and clearly brought out that it would be folly for me to do more than refer the reader to it. The case of Doe ex dem. Garnons v. Knight, 5 Barn. & C. 671, 12 E. C. L. 351, was determined upon the binding authority of previous adjudications. The question having hitherto remained undecided in this state, no such obstacle to its correct determination exists.

In the case of Cooper v. Jackson, 4 Wis. 537, it was expressly ruled that "it is essential to the legal operation of a deed that the grantee named therein assents to receive it, and there can be no delivery without such acceptance; but such acceptance need not be in person; it is sufficient if authorized or approved by the grantee." In that case the title of the grantee was held to be good as against the judgment creditor of the grantor upon the express ground that there was a previous understanding between the grantor and grantee that the deed should be executed by the grantor and delivered by him to the register of deeds, to be recorded. This, the court says, constituted the register the agent of the grantee for the purpose of receiving it. Upon this subject the following language is used: "The case at bar falls fully within the principle of Hedge v. Drew [12 Pick. 141, previously noticed, and commented upon in the opinion]. Here the grantee saw the deed after it was drawn, and the parties came to the understanding that the deed should be executed and left with the register to be recorded. There was an absolute divesting by the grantor of his estate in the land, and the deed was delivered to the register, who pro hac vice, may be considered the agent of the grantee to receive it. It is readily distinguishable from the cases where the grantor executes the deed without the knowledge of the grantee." In the case of McCourt v. Myers, 8 Wis. 236, there was no attempt by the mortgagor to deliver the chattel mortgage to the city clerk, or any third person, for the use and benefit of the mortgagees, and consequently no question upon the effect of such delivery arose. The only point adjudicated was that the mere act of the mortgagor in causing the mortgage to be filed in the office of the clerk was not such a delivery as would operate to give the mortgagees any title or interest in the goods specified in the mortgage.

The judgment of the circuit court is reversed, and a new trial awarded.

FORBES v. PARKER.

(16 Pick. 462.)

Supreme Judicial Court of Massachusetts. March Term, 1835.

This was a case against a depnty sheriff for taking forty-eight swine, which had been mortgaged to the plaintiff by Edward Walker, on July 5, 1833, to secure the payment of a promissory note of the same date, payable in six months from that time.

The mortgage deed, which was duly recorded on the day of its date in the records of the town of Charlestown, where the mortgagor then resided, contained a stipulation that, until there should be a default in the payment of the note after it became due, the mortgagor should retain possession of the swine, for the purpose of fattening and preparing them for market. On the next day after the mortgage was executed, the defendant attached the swine, on a writ in favor of Nathan Tufts & Co., who were alleged to be creditors of the mortgagor, and sold them under such attachment, without pursuing the provisions of St. 1829, c. 124 (Rev. St. c. 90, § 78). This attachment and sale were the cause of the present action. The defendant objected that case was not the proper form of action, but this objection was overruled. There was no evidence offered by the plaintiff of any actual delivery of the property in question; and the defendant contended that without such evidence the action could not be maintained. In this stage of the cause it was taken from the jury. Upon these facts the court were to order a nonsuit or default, as law and justice should require, reserving to the defendant, in case of a default, the right of being heard on the question of damages.

Fletcher & Tufts, for defendant.

PUTNAM, J. The question whether an action will lie for damages to a reversionary interest in personal property was settled in the affirmative by the case of Ayer v. Bartlett, 9 Pick. 156. We have re-examined that case, and have no desire to disturb the decision. Within a few months after it was pronounced, the legislature passed "a bill relating to mortgages and pledges of personal property and property subject to any lien created by law." St. 1829, c. 124. And the mortgage mentioned in the case at bar was made more than two years after the passing of the act.

There is no suggestion of any fraud in the case. The plaintiff was the mortgagee, and by his permission the swine mortgaged were to remain in the possession of the mortgagor six months, and until default of payment, "for the purpose of fattening and preparing them for market." Now, we say in this case, as was said by the court in Ayer v. Bartlett, that the creditors can be in no better condition than the debtor would be in regard to the plaintiff. If Walker, the mortgagor in possession, would have had no right to sell the property before the expiration of the time of payment of the debt, it is clear that his attaching creditors would not have any such right. Such an act on the part of Walker might, according to Farrand v. Thompson, 5 Barn. & Ald. 826, have been considered as putting an end to the contract on his part, and a revesting of the right of possession in the mortgagee, so as to enable him to maintain trespass or trover against the vendee. But the proceedings against Walker were in invitum, and therefore the contract may not have been rescinded. If it were not, then the action of trespass upon the case would be the proper remedy for the plaintiff, the mortgagee, whose reversionary interest was so destroyed.

Then it is objected for the defendant that the plaintiff's rights are to be determined as they existed at the commencement of his action, which was immediately after the mortgage, and six months before his debt became due; that it could not then appear but that the mortgagor would pay the debt when it would become due; and that, if he did, then the plaintiff would have suffered no damage from the acts of the defendant. The answer, we think, is that the plaintiff should be put in as good a situation as he was in when the property was thus taken away by the defendant. This is a special action of the case, and the plaintiff would have a right to be put into the possession of as much property as had been taken from him. The plaintiff would hold the money subject to the just claim of the mortgagor, or of his legal assigns, for an account. That would seem to be the just and equitable rule of the common law applicable to the case. But the legislature has provided, by the statute before recited, ample remedy for the creditors of the mortgagor. The act is predicated upon the confirmation of the contract between the mortgagor and mortgagee. If there should be any beneficial interest in the former remaining after paying the debt, it might be secured by the process of foreign attachment, or by an attachment upon the property itself subject to the lien; in which latter case the court might order and decree that on payment or tender of the debt to the mortgagee the property should be delivered over to the officer.

But the difficulty in the case at bar probably was that the property mortgaged would not have been more than sufficient to pay the debt, and therefore no benefit would have arisen from the trustee process, or that there was no beneficial interest in the mortgagor to arise from keeping and fattening the swine in the six months during which the mortgagor was to possess them. If the contract were faithfully performed by the mortgagor, the property mortgaged would be much increased in value; and if it were made sufficient to pay the debt when due, the mort-

gagor would have had recompense for his expense, care, and labor; if more, the mortgagor would have the excess. But a creditor of the mortgagor, who had attached the property, and substituted himself in the place of the mortgagor, might, for aught that appears, have been at great expense, and the benefit would have accrued to the mortgagee, if, after all, there had not been a surplus. Be these conjectures as they may, the remedy for the creditor of the mortgagor pointed out by St. 1829, c. 124, should have been pursued. He should either have summoned the mortgagee upon the trustee process, according to the first section, or attached the property subject to the lien created by the mortgage, according to the second section, which provides "that the person for whose benefit the same attachment is made or execution levied, shall first pay or tender to the mortgagee, pledgee or holder, the full amount of the demand for which the said property is mortgaged, pledged or subject to any lien as aforesaid." But instead of this, the creditor of the mortgagor has adopted a course which deprives the mortgagee of all benefits from his mortgage. He has caused the property to be attached and sold for his own security or payment, without making any provision for the payment of the debt due to the plaintiff, the mortgagee. We all think that it is not for such an attaching creditor of the mortgagor thus to disturb and usurp the rights of the mortgagee. And we think that the mortgagee has a right to recover damages presently for the value of the property, not exceeding, however, the amount of his just claim against the mortgagor, with all the damages sustained in the vindication of his rights.

The objection that there was no actual delivery cannot be maintained, as the recording of the mortgage deed in the records of the town of Charlestown, where the mortgagor resided, was legally equivalent to an actual delivery. That point has been recently determined in the case of Bullock v. Williams, 16 Pick. 33. Therefore, according to the case reported, the defendant is to be defaulted, and the damages assessed by the jury.

DORSEY v. HALL et al.

(7 Neb. 460.)

Supreme Court of Nebraska. July Term, 1878.

This case came up from Cuming county. Heard there upon a demurrer to the petition before Valentine, J. Demurrer sustained, and cause dismissed. Plaintiff appeals.

Uriah Bruner and R. F. Stevenson, for appellant. Crawford & McLaughlin, for appellees.

MAXWELL, C. J. On the 1st day of May, 1877, the plaintiff commenced an action in the district court of Cuming county to foreclose a certain mortgage executed by Robert Hall, Kate H. Hall, his wife, and David H. Winyall and Lina D. Winyall, his wife, to Thomas Wilson, on the 4th day of October, 1875, upon the N. W. ¼ of section 14, in township 23, range 5 E.; and also upon parts of lots 13, 14, 15, 16, and 17, in block 30, in the city of West Point,—to secure the payment of the sum of $1,950, according to the tenor of three promissory notes accompanying said mortgage, the last of which notes, calling for the sum of $1,200, was due and payable on the 1st day of April, 1877, which note was duly assigned by the said Wilson to the plaintiff, who brought this action thereon.

The petition alleges that in the year 1873 John D. Neligh sold to Thomas Wilson lots 13, 14, 15, 16, and 17, in block 30, in the city of West Point, and that in pursuance of said contract of purchase said Wilson, on or about the 1st day of September, 1873, took possession of said lots, and erected thereon a large livery and feed stable; that under the contract Neligh was to hold the legal title to said premises in trust for said Wilson, until said Wilson or his assigns should request a deed for said premises. It is also alleged that on the 1st day of October, 1875, Wilson sold the premises in question to Robert Hall and David H. Winyall, and took the mortgage in question from said parties; said Neligh still continuing to hold the legal title to said lots. On the 26th day of August, 1876, Hall sold his interest in said premises to James Gallen, who had actual notice of the existence of the mortgage; and on the same day Neligh and wife, in pursuance of the contract with Wilson, executed and delivered to Winyall and Gallen a warranty deed for said premises.

The petition further alleges that on the 16th day of December, 1876, Gallen and wife conveyed the undivided half of said premises to one George Gallen, with a view to defraud Hall and Wilson out of their just rights, and that on the 19th day of February, 1877, the said George Gallen conveyed by deed the undivided half of said premises to the wife of James Gallen. It is also alleged that certain defendants recovered judgments against Neligh after the 1st day of September, 1873. The tenth paragraph of the petition was stricken out on motion of the defendants as being redundant and irrelevant. The paragraph is as follows: "That said Robert T. Hall and David H. Winyall were the owners of said lots 13, 14, 15, 16, and 17, in the city of West Point, on the 4th day of October, 1876, as fully as if the legal title thereto had been in their names; and as such owners had the right to and were legally entitled to convey the same to the said Thomas Wilson by mortgage deed at that time, and incumber the same in all respects as if they held the legal title in their names; and that the said James Gallen and his assigns, the said George Gallen and Katie Gallen, have and hold the same subject to and with full knowledge of said mortgage."

It is difficult to perceive upon what grounds the motion was sustained. If it is urged that the averments are mere conclusions of law, still where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his action, the proper motion is to make definite and certain, and not to strike out. As the defendants deny the validity of the mortgage, the plaintiff properly sets forth in his petition the authority of the mortgagors to execute the same. The court therefore erred in sustaining the motion.

After the motion, striking out the tenth paragraph of the petition, had been sustained, the defendants demurred to the petition upon the ground that it stated no cause of action. The demurrer was sustained, and the cause dismissed. The case is brought into this court by appeal.

In support of the judgment of the court below it was urged by defendants' counsel on the argument of the case that the trust created by the contract between Wilson and Neligh was absolutely void, and that, therefore, the plaintiff acquired no lien by his mortgage, and therefore the petition stated no cause of action. The petition, however, includes the N. W. ¼ of section 14, township 23 N., of range 5 E., which is not in dispute, and upon which, if the facts stated in the petition are true, the plaintiff is entitled to a decree of foreclosure. This disposes of the case, but, inasmuch as the question of the validity of the mortgage upon the lots heretofore described will again come before the district court, we have thought it best to review that branch of the case.

It is a well-established principle of equity that, where a contract is made for the sale of real estate, it considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor. Malin v. Malin, 1 Wend. 625; Champion v. Brown, 6 Johns. Ch. 402; Watson v. Le Row, 6 Barb. 481; Willard, Eq. 610. And the trust in such case attaches to the land, and binds

the heirs of the vendor. Seton v. Slade, 7 Ves. 264; Swartwout v. Burr, 1 Barb. 495; Sutphen v. Fowler, 9 Paige, 280. And a subsequent purchaser from either the vendor or vendee, with notice, becomes subject to the same equities as the party would be from whom he purchased. Trinnere v. Bayne, 9 Ves. 209; Mackreth v. Symmons, 15 Ves. 329; Pollenfax v. Moore, 1 Atk. 573; Green v. Smith, 1 Atk. 572; Davie v. Beardsham, 1 Ch. Cas. 38; Champion v. Brown, 6 Johns. Ch. 403; Seaman v. Van Rensselaer, 10 Barb. 83; Story, Eq. 789.

In the absence of a contract, therefore, if the allegations of the petition are true, Neligh became a trustee for Wilson, or his assigns, of the lots in question. He has admitted the validity of the trust by carrying the same into effect, and it may be questionable if any of these defendants are in a position to deny its validity. The conveyance to James Gallen was made in pursuance of the terms of the agreement, and after the execution and recording of the mortgage. As to the judgment creditors, it is well settled in this court that the lien of a judgment upon real estate is subject to all prior liens, either legal or equitable. Metz v. Bank, 7 Neb. 165; Colt v. Du Bois, Id. 391. If, therefore, there was an actual sale of the lots in question to Wilson, although the legal title remained in Neligh at the time the judgments were recovered, yet the lien attached only to the unpaid purchase money, if any. Filley v. Duncan, 1 Neb. 134; Uhl v. May, 5 Neb. 157.

As to the authority to mortgage the property in question, it is sufficient to say that all kinds of property, real or personal, which are capable of absolute sale, may be mortgaged. 2 Story, Eq. Jur. § 1021; 4 Kent, Comm. 144; 1 Pow. Mortg. 17–23; 2 Bouv. Dict. 198.

As Hall and Winyall were in possession of the lots in question as owners thereof, at the time of the execution of the mortgage, they had unquestionable authority to execute the same; and if there is a defect in the description of the lots it may be corrected to conform to the actual intention of the parties. Galway v. Malchow, 7 Neb. 285.

For the errors herein referred to the judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

THRASH et al. v. BENNETT.

(57 Ala. 156.)

Supreme Court of Alabama. Dec. Term, 1876.

Appeal from circuit court, Dallas county; George H. Craig, Judge.

Action of trover by Armistead Bennett against Thrash, Day, and Cochran, for the conversion of 4,714 pounds of seed cotton upon which plaintiff claimed a mortgage. The defendants had seized the cotton under what is called in the record a search warrant. The court charged the jury that the search warrant was void; and if Thrash took cotton on which Bennett had a mortgage, and the other defendants aided him in it, by going on his bond, and having the cotton sold by Hardie & Robinson, etc., plaintiff would be entitled to recover of all the defendants. The defendants then requested the following charges in writing: "(1) If the jury believe from the evidence that the cotton alleged to have been taken by the defendant was raised by Dennis Cochran, upon the land rented from the plaintiff by said Dennis for the year, and as plaintiff's tenant, then the plaintiff had a landlord's lien on said cotton, and had no such interest or property in said cotton as would authorize him to recover in this action, and the jury must find for the defendant. (2) If the jury believe from the evidence that the substance of the contract between Cochran and plaintiff was that plaintiff was to furnish Cochran with land, and a mule, and supplies while cultivating said land, and that said Dennis agreed to give the plaintiff one bale of cotton, and such other portion of such crops as would be sufficient to pay for said supplies, then the plaintiff has no such interest in the cotton alleged to have been taken from Cochran as will authorize him to maintain this suit. (3) If the jury believe from the evidence that any portion of the cotton belonging to the defendant had been by the owner or by the plaintiff willfully mixed with the cotton alleged to have been taken by defendant, without the knowledge, fault, or consent of defendant, so that the cotton belonging to the defendant could not be separated from the cotton alleged to have been taken by the defendant, and that said cotton, so mixed, is herein sued for, then the jury cannot find for the plaintiff. (4) If the jury believe from the evidence that the cotton alleged to have been taken by defendant was taken under and by virtue of a search warrant, issued in accordance with law, by an officer duly authorized to issue the same, and executed by an officer duly authorized to do so by seizing said cotton, and that the cotton so seized is that alleged to have been taken by defendant in this action, and that said cotton was carried before the officer issuing said search warrant, and that said officer or magistrate has never disposed of said property by trial, then the plaintiff cannot recover in this action." The court refused to give either of these charges, and the defendants duly excepted. There was a verdict and judgment for plaintiff, from which the defendants appeal. The other facts sufficiently appear from the opinion.

Reid & May, for appellants. Pettus, Dawson & Tillman, contra.

STONE, J. We propose to consider only the questions raised by the assignments of error. There was certainly no error in excluding from the jury evidence that 12 of the persons composing the grand jury at a certain term were colored men or freedmen. Such testimony could have shed no legitimate light on any question raised by this record. The controlling matter of contest was whether the cotton belonged to Bennett, the plaintiff, or Thrash, one of the defendants. The tendency of the testimony offered would have been to multiply the issues unduly, and to confuse the jury in their deliberations. The whole action of the grand jury, first and second, presented questions foreign from the issues being tried, and, if objected to, should have been excluded. Governor v. Campbell, 17 Ala. 566; 1 Brick. Dig. p. 809, § 81; Mobile Marine Dock, etc., v. McMillan, 31 Ala. 711; Crews v. Threadgill, 35 Ala. 341.

There is no exception reserved to the affirmative charge given which justifies us in considering it. Gager v. Gordon, 29 Ala. 341. To authorize the reversal of a cause on account of charges asked and refused, the charge asked must assert a correct legal proposition in view of the evidence before the jury; must not be abstract, ambiguous, or calculated to mislead; and must be true and consistent with the evidence in all its postulates of law and fact. If it be wanting in any one of these particulars, it is the privilege, if not the duty, of the court to refuse it. 1 Brick. Dig. pp. 338, 339, §§ 41, 48, 59-61, 65; McLemore v. Nuckolls, 37 Ala. 675.

Among the questions raised by the charges asked is the legality of what is called in the record a search warrant. The grounds on which such warrant may be issued, and the manner of suing it out, are shown in Rev. Code, § 4377, and sections following. Section 4377 declares on what grounds a search warrant may be issued. An examination of the affidavit and warrant of search will show that they charge no criminal offence, and specify none of the grounds mentioned in the statute. Section 4378 declares that such search warrant "can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and place to be searched." Sections 4379, 4380, declare what preliminary proof shall be made; and section 4381 gives directions for the issue of the warrant. The affidavit and warrant in the present record are so manifestly imperfect that we deem it unnecessary to specify the imperfections. They are void. Duckworth v. Johnson, 7 Ala. 578; Sullivan v. Robinson, 39 Ala. 613.

Two witnesses examined in this cause tes-

tify that Dennis Cochran rented land from Bennett, the plaintiff, and became his tenant. They also testify that Cochran executed a mortgage to Bennett on his crop to be grown, to secure the agreed rent, the hire of the mule, and for advances to be made by Bennett; and that the last two items remained unpaid when the present action was brought. There was no objection or exception to this evidence, and we are not informed whether the mortgage was in writing or was oral. A mortgage of chattels, however, is good in either form. Morrow v. Turney, 35 Ala. 131. And a mortgage on a crop to be grown is good; and, when produced, the mortgagee is entitled to the possession, and may maintain an action for its recovery. 2 Brick. Dig. p. 245, §§ 9, 11; Doe v. McLosky, 1 Ala. 708; Knox v. Easton, 38 Ala. 345; Mansony v. Bank, 4 Ala. 735; Booker v. Jones, 55 Ala. 266.

The first charge asked entirely ignored the question of mortgage, and was rightly refused on that account. True, if only the relation of landlord and tenant had existed, the charge would have asserted a correct legal proposition. But the charge withdrew from the consideration of the jury all the testimony tending to prove a mortgage.

If the word "substance," in the second charge, be emphasized or if it had said, if the jury believed there was no other contract than the one supposed in the charge, then, on a technical criticism, the charge might be pronounced correct, as far as it goes. But it, like the first, ignores the proof of mortgage. Its tendency was to mislead, and the court did not err in refusing it.

The third charge contains a singular repugnancy. Its language is: "If the jury believe from the evidence that any portion of the cotton belonging to the defendant [Thrash] had been by the owner [Thrash] or by the plaintiff [Bennett] willfully mixed with the cotton alleged to have been taken by the defendant," etc. It is manifest that if the cotton was mixed, and the confusion produced by Thrash, this could not defeat Bennett's suit. This charge was correctly refused on this ground, if for no other.

In declaring the search warrant void, we have, in effect, said the fourth charge should not have been given. It was abstract. Affirmed.

JONES v. RICHARDSON.

(10 Metc. 481.)

Supreme Judicial Court of Massachusetts. Oct. Term, 1846.

Assumpsit on the receipt and promise set forth in the award hereinafter stated. The action was referred to an arbitrator, under a rule of court which contained this provision: "He shall, at the request of either party, state in explicit terms, upon the face of his award, the exact evidence and facts in respect whereof either of the said parties shall think fit to state or raise any legal objection or question, whether upon the admissibility or competency of any evidence or witness, or upon any question of law. The case is to be heard and determined upon the principles which should govern a court and jury." The arbitrator's award was as follows:

"The subscriber, named as referee in the foregoing rule, met the parties thereto, by their counsel, on the 3d of July, 1845, at Boston. The plaintiff gave in evidence, to support the demand made by him on the defendant, the following written instrument:

"'Norfolk—ss.: Sept. 9th, 1842. Received of Nathan Jones, deputy sheriff for the county of Norfolk, the personal property contained in the schedule hereafter written, which were this day attached by said Jones as the property of Addison Richardson, at the suit of E. Wasson, Henry Peirce, Rufus Clements, and on several other writs vs. said Richardson and others; the writs being returnable at the next court of common pleas at Boston, in the county of Suffolk, on the first Tuesday of October next; and having received of said Jones one dollar in full for my services, I do promise to keep said goods safely, and deliver the same to said Jones, in good order, on demand.

"'Schedule. The whole of the remainder of said Richardson's stock in trade now in said Lewis Richardson's house, consisting of broadcloths, other woollen goods, cotton goods, crockery ware, hardware, silk goods, and all other goods of every description, which were removed to my place by said Addison Richardson. Said goods are contained in several boxes, except the crockery ware, estimated at the value of fifteen hundred dollars. Lewis Richardson.'

"The plaintiff also gave evidence, and it was admitted by the defendant, that he demanded a delivery by the defendant of the above-mentioned goods, in the month of June, 1843, and that the defendant refused to deliver them. The defendant offered to prove, and the plaintiff admitted, that when the action which is the subject of this reference was commenced, the suits on which said goods were attached were not disposed of, but were pending in court; and the defendant thereupon objected that this action was prematurely brought and could not be maintained. The subscriber deemed this objection groundless.

"The defendant then gave in evidence the following mortgage to him, which was recorded by the clerk of the town of Medway, on the 7th of September, 1842: 'Know all men by these presents, that I, Addison Richardson, of Medway, in the county of Norfolk, and commonwealth of Massachusetts, in consideration of two thousand dollars, to me in hand paid by Lewis Richardson, of said Medway, the receipt whereof is hereby acknowledged, do hereby bargain and sell unto the said Lewis the following personal property, viz. the whole stock in trade of said Addison, as well as each and every article of merchandize which the said Addison this day bought of Timothy Walker, being in a store formerly kept by said Walker in said Medway, as every other article constituting the said Addison's stock in trade, in the shape the same is and may become in the usual course of the said Addison's trade and business as a trader. To have and to hold the same to the said Lewis, as his own proper goods and chattels. The condition of the above sale is this: If the said Addison pay the said Lewis a note of hand, this day given by him, for two thousand dollars, and interest thereon, then this shall be void; otherwise to remain in full force. In witness whereof I, the said Addison, have set my hand and seal this seventh day of October, A. D. 1840. Addison Richardson. [Seal.]'

"It was stated by the plaintiff and admitted by the defendant that the goods which are the subject of this reference were formerly the stock in trade of said Addison Richardson, but that only a part of them was owned by him until after he made said mortgage.

"The plaintiff did not deny that the note of two thousand dollars mentioned in said mortgage was justly due from said Addison to the said Lewis, and was wholly unpaid. But the plaintiff insisted that said mortgage was, on the face of it, fraudulent, and wholly void as against other creditors of said Addison, or, if not wholly void, that it was void as to all the goods which were not a part of said Addison's stock in trade when the mortgage was executed. The defendant thereupon offered to introduce evidence that he had taken possession of all the goods which are the subject of this reference, before they were attached by the plaintiff, for the purpose of foreclosing the mortgage. But the subscriber, deeming such evidence irrelevant, refused to receive it. He also was of opinion that the mortgage was valid as to all the goods which were attached by the plaintiff. The defendant then proposed to give evidence that the true value of the goods which were attached was much less than fifteen hundred dollars; but the subscriber, being of opinion that the defendant was answerable to the plaintiff, if at all, for the sum at which the

goods were estimated in the defendant's receipt, refused to receive such evidence.

"The defendant next insisted that by the true construction of the defendant's receipt, taken in connection with said mortgage, the plaintiff attached only so much of the mortgaged property as should be found to remain after payment therefrom of the debt for which it was mortgaged, to wit, the mortgagor's right in equity to redeem said property. But the subscriber was of opinion that the plaintiff neither did nor could make such attachment, and that the whole property in said goods was attached by him, and was included in the receipt given to him by the defendant.

"The defendant then gave in evidence a written demand delivered by him to the plaintiff, after said attachment was made and said receipt given, but on the same day, of the following tenor: 'Be it known to you that I, the subscriber, have a mortgage on the goods and property which Addison Richardson has put in my keeping, to the amount of two thousand dollars and interest. I hereby demand the same sum of you, to be paid within the time specified by law, as you have attached said property. Lewis Richardson. September 9th, 1842.'

"It was admitted by the plaintiff that he had paid nothing to the defendant after said demand; but he denied that said demand, and his omission to pay anything to the defendant, were sufficient in law to dissolve the attachment. The subscriber was of opinion that the defendant was entitled by law to defend this action under his mortgage, and that the said demand made on the plaintiff by the defendant was good and sufficient, at least for the sum of two thousand dollars, which exceeds the value of the goods attached, as estimated by the parties. The subscriber, therefore, on the foregoing statement, is of opinion, and accordingly awards, subject to the opinion of the court to which this award is returnable, that the plaintiff has no cause of action against the defendant, and that the defendant recover of the plaintiff costs of court, to be taxed by the court, and also the costs of reference.

"Theron Metcalf."

G. M. Brown, for plaintiff. Richardson & Lovering, for defendant.

WILDE, J. This case, at a former term, was referred to the determination of an arbitrator, who was required, at the request of either party, to state the evidence and facts in respect whereof either of the parties should think fit to raise any legal question. In pursuance of this reference, a hearing of the parties has been had before the arbitrator, and the case comes before us on his report.

At the hearing, it appeared in evidence that the plaintiff claimed the property in question between the parties by virtue of an attachment thereof as the property of one Addison Richardson, and that the defendant claimed the same under a mortgage to him from the said Addison, made and recorded before the said attachment; and the principal question submitted to the court by the arbitrator is whether the said mortgage is valid against the creditors of the mortgagor. The property mortgaged is thus described in the deed: "The whole stock in trade of said Addison, as well as each and every article of merchandize which the said Addison this day bought of Timothy Walker, as every other article constituting the said Addison's stock in trade, in the shape the same is and may become in the usual course of the said Addison's trade and business as a trader." And it was admitted that the goods in question were, at the time of the attachment, the stock in trade of the said Addison, but that only a part of them was owned by him until after he made the said mortgage. It has been contended by the plaintiff's counsel that the mortgage was in law fraudulent and void against bona fide attaching creditors; or, if not wholly void, that it was void as to all the goods which were not a part of the mortgagor's stock in trade when the mortgage was executed. There seems to us to be no ground for the argument that this mortgage was wholly void, as being fraudulent on the face of it, or as having been made with an intent to defraud the creditors of the mortgagor. It was not denied that the mortgage was given to secure a large debt due from the mortgagor to the mortgagee; and no evidence was introduced at the hearing tending to prove that the mortgage was not made bona fide. The question, therefore, is reduced to this, namely: whether the defendant has acquired any valid title, under the mortgage, to the goods purchased by the mortgagor subsequently to the mortgage.

That a person cannot grant or mortgage property of which he is not possessed, and to which he has no title, is a maxim of the law too plain to need illustration, and which is fully supported by all the authorities. Perkins, § 65, says, it is a common learning in the law that a man cannot grant or charge that which he hath not. Bac. Abr. "Grants," D, 2; Com. Dig. "Grant," D. It is true that a person may grant personal property of which he is potentially, though not actually, possessed. A man may therefore grant all the wool that shall grow on the sheep which he owns at the time of the grant, but not the wool which shall grow on sheep not his, but which he afterwards may buy. So a parson of a church may grant his tithes for years, for, although they are not actually in him at the time, yet they are potentially; and the same exception to the general rule extends to grants of crops growing on lands of the grantors at the time of the grants. Lunn v. Thornton, 1 Man., G. & S. 383, and the authorities there cited. Not deny-

ing these principles, the defendant's counsel contend that, although the mortgagor could not convey or create a charge on property to which he had no title nor possession, actual or potential, yet when he, after the mortgage, added to his stock in trade by new purchases, the property vested immediately in the mortgagee, without any other act or conveyance on the part of the mortgagor, by virtue of the previous agreement to that effect contained in the mortgage deed. One of the cases cited in support of this argument is Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673. But that case was decided on principles of equity, and on the construction of the United States bankrupt act of 1841 (chapter 9), on which it was held "that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and consequently that they are affected with all the equities which would affect the bankrupt himself, if he were asserting those rights and interests." "It is material here to state," says the learned judge, in giving his opinion, "that the present is not a controversy between a first and second mortgagee as to property acquired and in esse after the execution of the first mortgage, and before the execution of the second mortgage, both the mortgagees being purchasers for a valuable consideration. That might at law present a very different question." The decision, therefore, in that case, is of no authority in favor of the defendant in the present case, but seems rather to be an authority impliedly in favor of the plaintiff, who claims under an attachment by a bona fide creditor of Addison Richardson, the mortgagor. The same remark may be made as to the case of Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,861. That was a case in equity, in which the plaintiffs relied on an equitable lien on certain shipments, and the proceeds thereof, in the hands of the defendant, the assignee of James Read & Co., as collateral security for advances made to them by the plaintiffs. And this lien was adjudged valid, as an equitable charge on the property, constituting a trust. But these decisions have but little bearing on the question under consideration. Many things are held by courts of equity to be assignable which are not so held by courts of law. So the legal distinctions between executory and executed contracts are, in many cases, disregarded by courts of equity. But the present case is to be decided according to the principles of the common law. The question is, what are the legal rights of the respective parties to the property in question?

One of the principal cases relied on by the defendant is that of Macomber v. Parker, 14 Pick. 497. In that case it appeared that Hunting & Lawrence were lessees of a brickyard, and entered into a contract with Joseph Evans, by which he was to make for them a certain number of bricks on certain terms, and to share the profit or loss between them, one-half each; Evans agreeing that Hunting & Lawrence should have full power to retain Evans' part of the bricks or money, to the amount of all sums of money due or which might become due from him to them. Hunting & Lawrence afterwards assigned to the plaintiffs all their property, including the brickyard, and their rights under the contract with Evans, to which Evans assented, and agreed to act as agent for the assignees. This unquestionably was a good assignment, upon the principles already stated. Hunting & Lawrence not only had a potential possession, but they owned the clay of which the bricks were to be made, subject only to the right which Evans might afterwards acquire by his contract. The transmutation of the clay into bricks did not change the right of property; so that Evans could not acquire an absolute legal title to his share of the bricks until he paid the balance due to the plaintiffs. Upon this view of the case, the question as to the right which might be acquired by pledging or hypothecation of property was not material to the decision of the case. But, if it were otherwise, the doctrine laid down by the learned judge who delivered the opinion of the court in that case is not applicable to the present case. For if, when a party agrees to pledge property afterwards to be acquired, and, when it is acquired, delivers over the same to the pledgee, the right of the pledgee would then attach, it does not follow that the same doctrine would apply to a mortgage sale. A mortgage is an executed contract; and it is clear that nothing passed by the mortgage deed in this case besides the stock in trade which the mortgagor had at the time the mortgage was executed. But in Abbott v. Goodwin, 20 Me. 408, it was held that, where certain goods were mortgaged, and the mortgagor afterwards exchanged some of the goods mortgaged for other goods, the mortgagee thereby acquired a title to the goods taken in exchange. And the case of Macomber v. Parker was cited by the learned judge who delivered the opinion of the court as a strong case in support of this decision, without noticing the distinction between the two cases. We cannot, however, concur in the principles upon which the case of Abbott v. Goodwin was decided. It was laid down in that case that "all persons coming in under the mortgagor stand by substitution in his place, equally affected by the contract, whether notified of its existence or not." But the defendant in that case had attached the property as the property of the mortgagor; and, though he claimed under him, he might show that the mortgage and the exchange of property were void as to the creditors of the mortgagor, though they might be valid against him by way of estoppel or otherwise. And that case seems to be impliedly, though not expressly, overruled by the case of Goodenow v. Dunn, 21 Me. 86. And we fully concur with Whitman, C. J., in the principles laid down by him in deciding the latter case. In the former case

the mortgage deed had no reference to any property afterwards to be acquired by the mortgagor, and the case seems to have been decided on the assumed fact that the property mortgaged was afterwards exchanged for the property in dispute, with the assent of the mortgagee; but it does not appear that the exchange was made with his assent, or that there was any agreement to this between the mortgagor and the mortgagee. In the case of Tapfield v. Hillman, 6 Man. & G. 245, the construction and legal effect of a similar mortgage were considered, and it was decided that the mortgagee had no title to any property acquired by the mortgagor subsequently to the date of the mortgage. There was a clause in the mortgage, giving power to the mortgagee, upon nonpayment of the debt, to enter into the mortgaged premises, and "to take, possess, hold and enjoy all and every the goods, chattels, effects and premises." And it was held that the mortgagee had no right to take any property but what was on the mortgaged premises at the date of the mortgage. It was, however, said by Tindal, C. J., that "it would have been very easy so to have framed the power of entry as to make it extend to all effects found upon the premises at the time that such power should be enforced, if such was the intention of the parties." From this the defendant's counsel infer that such a power would have been upheld by the court. And it would, undoubtedly, have been a good defence in that action, if the mortgage had contained such a power; for it was an action of trespass by the mortgagor against the mortgagee.

But although the mortgagee, with such a power, would be justified in seizing the goods of the mortgagor, purchased by him subsequently to the date of the mortgage, it would not vest the property in the mortgagee. And so it was decided in the case of Lunn v. Thornton, 1 Man., G. & S. 379, which afterwards came before the same court, and was decided in February, 1845. The plaintiff in that case had a bill of sale from the defendant of "all and singular his goods, household furniture, plate, linen, china, stock and implements of trade, and other effects whatsoever, then remaining and being or which should at any time thereafter, remain and be in, upon or about his dwelling-house," etc. And it was held that future-acquired property would not pass by such a conveyance, unless the grantor should ratify the grant after he had acquired the property therein. The counsel for the defendant relied, among other authorities, on Bacon's Maxims, Reg. 14, "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu." A strong case in support of the rule is cited by Bacon. "If I mortgage land, and after covenant with I. S., in consideration of money which I receive of him, that after I have entered for the condition broken, I will stand seized to the use of the same I. S., and I enter, and this deed is enrolled, and all within the six months, yet nothing passeth; because the enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in that case, because of the vehement relation which the enrolment hath to the time of the bargain and sale, at what time he had nothing but a naked condition." 4 Bac. Works (Ed. 1803) 55.

It was contended on the part of the plaintiff, in Lunn v. Thornton that the bringing of the goods on the plaintiff's premises, where they were seized after the execution of the bill of sale, was the new act done by the plaintiff, which gave the declaration contained in the previous bill of sale its effect. But the court held clearly that it could have no such effect. "The new act," Lord Tindal said, "which Bacon relies upon, appears, in all the instances which he puts, to be an act done by the grantor, for the avowed object and with the view of carrying the former grant or disposition into effect." This adjudication, which appears to us to be founded on well-established principles, is decisive against the defendant's claim as to the property purchased by the mortgagor after the mortgage. He did not prove, nor offer to prove, any act done by the mortgagor, after the mortgage deed was executed, by which he ratified the same as to the subsequently acquired property. All he offered to prove was that he had taken possession of the goods before the attachment. But this evidently was irrelevant, as it was held to be by the arbitrator. But if he had proved that the mortgagor had delivered possession to him of the goods in question, to hold the same under the mortgage, that it would not have availed him against the plaintiff, although it might be good against the mortgagor. By Rev. St. c. 74, § 5, it is provided that "no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." Now, it is clear, we think, that the record of the mortgage deed is no sufficient notice of a legal incumbrance as to subsequently acquired property, because by law no such property could be sold or conveyed thereby; and it would furnish no notice that any property would be afterwards purchased, or, if purchased, that any act would be done to ratify the grant in that respect. As to such property, therefore, the mortgage could not be valid except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee, with the intention to ratify the mortgage, and the mortgagee retained open possession of the

same until the time of the attachment. Whether such proof would be sufficient against creditors, it is not necessary to decide, as, according to the report of the arbitrator, no such question has been raised.

As to the other questions raised, we think the decisions of the arbitrator were correct, and that upon the whole matter the plaintiff is entitled to recover the estimated value of the goods in question, which were not the property of the mortgagor when the mortgage was executed, and no more. The case, therefore, is to be recommitted to the arbitrator, to ascertain what goods were mortgaged, unless the parties should agree as to this matter.

WILLIAMS v. BRIGGS et al.

(11 R. I. 476.)

Supreme Court of Rhode Island. March 3, 1877.

Trover, heard by the court, jury trial being waived.

Tillinghast & Ely, for plaintiff. Benjamin N. Lapham and Daniel R. Ballou, for defendants.

DURFEE, C. J. This is an action for trover for the conversion of certain articles of personal property, which the plaintiff claims to own as administrator on the estate of the late William B. Lawton. The title of William B. Lawton accrued to him under two mortgages, executed to him by the defendant Nicholas C. Briggs, and dated, respectively, January 1, 1867, and July 2, 1870. The second mortgage purports to convey to Lawton "all and singular the tools, fixtures, stock in trade for the manufacture of carriages, and also all carriages made or in process of manufacture, now in my carriage factory, No. 254 High street, in said city [Providence], together with all my right, title, and interest in and to the land and building used for and in connection with said factory. And also all and every article and thing that may be hereafter purchased by me to replace or renew the articles and things hereinbefore conveyed, and also all stock, fixtures, and carriages, whether manufactured or in process of manufacture, that may be hereafter purchased by me to be used in or about my business of buying and selling, making and repairing carriages." On the 14th of August, 1875, the defendant Nicholas C. Briggs made to the defendant Edwin Winsor a general assignment of all the property of which he was the lawful owner, excepting only what and so much as was exempt from attachment by law, in trust for the equal benefit of all his creditors. Under this assignment the said Edwin Winsor took possession of the assigned property, among which was the property for the conversion of which this action is brought. It appeared at the trial, which was had before the court, jury trial being waived, that only a small part of the property which is in controversy was in the possession or ownership of the said Nicholas C. Briggs at the time the second mortgage was made, the larger part of it having been subsequently acquired for the purpose of renewing or replacing the stock and property which the said Nicholas C. Briggs then had. The case, therefore, raises the question whether a mortgage of property to be subsequently acquired conveys to the mortgagee a title to such property when acquired, which is valid at law as against the mortgagor or his voluntary assignee. The question is one which, so far as we know, has never been decided in this state by the supreme court sitting in banc.

We think such a mortgage is ineffectual to transfer the legal title of the property subsequently acquired, unless when acquired possession thereof is given to the mortgagee, or taken by him under the mortgage. This view is supported by numerous cases in Massachusetts: Jones v. Richardson, 10 Metc. (Mass.) 481; Moody v. Wright, 13 Metc. (Mass.) 17; Barnard v. Eaton, 2 Cush. 294; Codman v. Freeman, 3 Cush. 306; Chesley v. Josselyn, 7 Gray, 489; Henshaw v. Bank of Bellows Falls, 10 Gray, 568. By cases in other states: Otis v. Sill, 8 Barb. 102; Milliman v. Neher, 20 Barb. 37; Hunt v. Bullock, 23 Ill. 320; Hamilton v. Rogers, 8 Md. 301; Chynoweth v. Tenney, 10 Wis. 397; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207; Single v. Phelps, 20 Wis. 398. And by cases in England: Gale v. Burnell, 7 Q. B. 850; Lunn v. Thornton, 1 C. B. 379; Robinson v. McDonald, 5 Maule & S. 228; Congreve v. Evetts, 10 Exch. 298; also in 26 Eng. Law & Eq. 493. The reason on which the cases rest is expressed in the maxim, "Nemo dat quod non habet." No person can grant or charge what he has not. The maxim in its strict sense is confined to cases at law. There are cases in equity which hold that such a mortgage is effectual to charge the property when acquired with an equitable lien, or to create an equitable title in it in favor of the mortgagee against the mortgagor, and even, as some of the cases maintain, against attaching creditors, especially where they have actual notice of the mortgage. Holroyd v. Marshall, 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Peunock v. Coe, 23 How. 117; Galveston R. Co. v. Cowdrey, 11 Wall. 459; U. S. v. New Orleans R. Co., 12 Wall. 362; Butt v. Ellett, 19 Wall. 544; Smithurst v. Edmunds, 14 N. J. Eq. 408; Tedford v. Wilson, 3 Head, 311; Sillers v. Lester, 48 Miss. 513; Seymour v. Canandaigua & N. F. R. Co., 25 Barb. 284. The ground of these decisions is that the mortgage, though inoperative as a conveyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him in accordance with the familiar maxim that equity considers that done which ought to be done. But in the case at bar the plaintiff is not suing in equity, but at law in an action of trover for the tortious conversion of the property; and is suing, not a mere wrongdoer, but the persons having the legal ownership of the property, and certainly, therefore, cannot prevail without proof of something more than a merely equitable title or interest. He ought to prove that he has the legal title or ownership, either general or special, and the right of present possession. Fulton v. Fulton, 48 Barb. 581; Herring v. Tilghman, 13 Ired. 392; Killian v. Carrol, 13 Ired. 431; Lonsdale v. Fairbrother, 10 R. I. 327.

It is true, language was used in some of the cases above cited, decided in the supreme court of the United States, which seems to go beyond what we have stated to be the effect of the cases; but the cases referred to were cases in equity, and we presume, therefore, the language was designed to express the rule in equity, and not at law, except in so far as the rule at law had been modified by statute; or, the cases, being railway cases, in so far as the rule may be regarded as modified by considering the rolling stock and equipment of a railroad as fixtures. And see Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484; Pierce v. Emery, 32 N. H. 484.

The plaintiff's counsel claims that there are cases at law upon the authority of which he is entitled to recover. He cites Chapman v. Weimer, 4 Ohio St. 481; Carr v. Allatt, 3 Hurl. & N. 964; Chidell v. Galsworthy, 6 C. B. (N. S.) 470. In these cases possession of the after-acquired property had been given to the mortgagee, or lawfully taken by him under the mortgage and it was for this reason that the mortgagee was held to have acquired the legal title, and not because it was supposed the mortgage itself was effectual to transfer it. There are numerous cases which hold that, though the mortgage per se is inoperative to transfer the legal title, possession so given or taken under it transfers the legal title to the mortgagee, being the "novus actus interveniens" required by Lord Bacon's maxim to give effect to the mortgage as a declaratio praecedens. The maxim is, "Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praecedens quœ sortiatur effectum, interveniente novo actu." Broom, Leg. Max. 498; Hope v. Hayley, 5 El. & Bl. 830. Also in 34 Eng. Law & Eq. 189; Langton v. Horton, 1 Hare, 549; Congreve v. Evetts, 10 Exch. 298. Also in 26 Eng. Law & Eq. 493; Baker v. Gray, 17 C. B. 462; Carrington v. Smith, 8 Pick. 419; Rowley v. Rice, 11 Mete. (Mass.) 333; Rowan v. Sharp's Rifle Manuf'g Co., 29 Conn. 282; Titus v. Mabee, 25 Ill. 257; Chapin v. Cram, 40 Me. 561; Bryan v. Smith, 22 Ala. 531; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207. In the case at bar the plaintiff has never acquired the legal title in this way, for he has never been in possession of the property.

The plaintiff also claims to be entitled to recover upon the authority of Abbott v. Goodwin, 20 Me. 409. The mortgage in that case was not a mortgage of property to be subsequently acquired. It was a mortgage given to secure the payment of certain notes upon a stock of goods then in the possession of the mortgagor, and contained a stipulation that the mortgagor should retain possession of the goods, "and pay over and account for the proceeds of all sales of said goods to them [the mortgagees], to be applied in payment of said notes, or directly to apply said proceeds to the payment of said notes, at the discretion" of the mortgagees. The action was trespass for taking four hundred casks of lime, obtained by the mortgagor in exchange for goods or the proceeds of goods mortgaged to the plaintiffs. The court sustained the action, holding that the lime must be considered as substituted for and representing the goods which were mortgaged, having been exchanged for them or their proceeds, by the mortgagor acting as the agent of the mortgagees.

In the case at bar there was no stipulation reserving to the mortgagee control of the proceeds of the property sold by the mortgagor, and, moreover, there is no evidence that the new property was paid for out of the proceeds of the old, or, in fact, that it was paid for at all, though there is evidence that it was acquired to renew or replace the old. We think, therefore, the case of Abbott v. Goodwin, 20 Me. 408, is not an authority which can control the case at bar. And see Rhines v. Phelps, 8 Ill. 455; Holly v. Brown, 14 Conn. 255, 265; Levy v. Welsh, 2 Edw. Ch. 438; Chapin v. Cram, 40 Me. 561.

In Hamilton v. Rogers, 8 Md. 301, it was held that a mortgage of goods in a store, "together with all renewals and substitutions for the same or any part or parts thereof," did not convey subsequently acquired goods so as to give the mortgagee an action at law against a party seizing them. And Rose v. Bevan, 10 Md. 466, maintains that the rule is the same, even though the new goods are paid for out of the proceeds of the old. And in Massachusetts such mortgages have been repeatedly condemned as ineffectual to confer any title to the goods subsequently acquired, though acquired in the usual course of business, and by way of substitution for goods which were mortgaged. Jones v. Richardson, 10 Mete. (Mass.) 481; Moody v. Wright, 13 Mete. (Mass.) 17; Barnard v. Eaton, 2 Cush. 294. And see Codman v. Freeman, 3 Cush. 306. In the case at bar the only fact proved is that the new goods were acquired in the usual course of business to replace the old. We do not think this is enough to give the mortgagee the same title in the new goods which he had in the old, or in fact to give him any legal title in them.

The plaintiff contends that the defendants are estopped from denying his title. The facts set up by the defendants are not in contradiction of, but in conformity with, the mortgages. The mortgages contain no express covenants of title. The case, therefore, discloses no ground for the application of the doctrine of estoppel. Chynoweth v. Tenney, 10 Wis. 397. We decide that the plaintiff cannot recover in this action for goods acquired after the mortgage was given. The court also find the defendants not guilty of converting the remainder of the property. The evidence shows that the defendants refused to surrender all the property to the plaintiff. It does not show to the satisfac-

tion of the court that they refused to surrender so much of the property as was on hand when the mortgage was given.

POTTER, J. While I cannot concur in all the statements of law in the opinion of the majority of the court, I concur in the result. So long as we maintain the system of forms of actions which we have inherited from England, and by which justice is so often sacrificed to mere technicalities, we must hold that an action of trover cannot be sustained in a case like the present. Judgment for the defendant for his costs.

After the foregoing opinion had been given, the plaintiff filed a bill in equity against Winsor and Briggs to establish his lien under the mortgage on the property acquired subsequent to its execution. The court granted the relief prayed for. See Williams v. Winsor, 12 R. I. 9.

LANDERS et al. v. GEORGE et al.

(49 Ind. 309.)

Supreme Court of Indiana. Nov. Term, 1874.

Appeal from circuit court, Tipton county.

J. E. McDonald, J. M. Butler, W. R. Harrison, and W. S. Shirley, for appellants. J. Hanna, F. Knefler, and C. L. Holstein, for appellees.

DOWNEY, J. This record presents two cases between the parties; one commenced by the appellants against the appellees, and the other commenced by the appellees against the appellants. It presents also a question as to the operation and effect of a judgment in a third case between the parties, which was terminated before the commencement of the other two. This last-named action, which we will for convenience designate as number one, was brought by Landers and others against George, sheriff of Tipton county, for the recovery of the possession of personal property, consisting of a stock of dry goods, groceries, provisions, etc., of which it was alleged the plaintiffs were the owners and entitled to the possession, and which had been wrongfully taken, and were unlawfully detained by the defendant. The goods were alleged to be of the value of eighteen hundred dollars. Judgment was asked for the recovery of possession of the property, and for ten dollars damages for the detention thereof.

The defendant answered: (1) A general denial. (2) Property in Harlin and Boulden. (3) Property in the defendant. (4) That certain judgments had been rendered against Harlin and Boulden, on which executions had been issued to the said George, as sheriff, which he had levied on the goods, which he alleged were at the time the goods of Harlin and Boulden, in their possession, and subject to the executions; that the executions were still in his hands, and the goods subject to the lien thereof.

The second and third paragraphs of the answer were struck out on motion of the plaintiffs, and there was a reply to the fourth, a demurrer to which was filed by the defendants and sustained by the court. The record in the cause then proceeds as follows:

"And the plaintiffs failing to except further, this cause is now submitted to the court for trial as to the value of the property mentioned in the complaint; and the court having heard and examined all the evidence, and being sufficiently advised in the premises does find that the property mentioned in the complaint is of the value of two thousand nine hundred dollars, and that the defendant is entitled to have the same returned to him, and upon failure of the plaintiffs so to return the same, is entitled to recover the value thereof; and the court assesses the damages of the defendant against the plaintiffs, on account of the detention of said property, at the sum of one dollar. It is therefore considered by the court, that the defendant recover of the plaintiffs the sum of one dollar, his damages assessed by the court, and all costs and charges, etc.; and, further, that he recover of the plaintiffs the property mentioned in the complaint; and upon failure of the plaintiffs to return to the defendant said property, that he recover of the plaintiffs the value thereof, viz. the sum of two thousand nine hundred dollars." The residue of the entry relates to the prayer for, and the granting of, an appeal to this court. This appeal was perfected, and, in this court, the judgment below was affirmed. See 40 Ind. 160.

Before the appeal was taken in that case, however, a suit on the replevin bond, which we may designate as number two, was instituted by the appellees in this case, the sheriff and the plaintiffs in the executions which he held, against the appellants herein. The complaint sets out in detail the recovery of the several judgments against Harlin and Boulden, the issuing of executions, their levy on the property, the institution of the action of replevin, the execution of the bond, the issue and judgment in the replevin suit, the failure of the appellants herein to return the goods according to the judgment in the replevin suit; concluding with a prayer for judgment for the value of the goods, two thousand nine hundred dollars.

While the appeal in the replevin suit was pending in this court, the suit on the replevin bond, number two, was suspended. After the case number one was decided on appeal, the defendants in that action answered, in number two, on the replevin bonds:

(1) A general denial.

(2) The second paragraph was held bad on demurrer, after a portion of it had been struck out; no question is made as to this ruling.

(3) In the third paragraph, as to part of the amount demanded, the defendants alleged, that before the issuing and levy of the executions, on the 15th day of January, 1869, Harlin and Boulden were the owners of the stock of goods, etc., and were indebted to the defendants in certain amounts mentioned, and being so indebted they, on the day and year aforesaid, executed to the defendants a bill of sale of the stock of goods, etc., to secure the payment of said debts; that the same was duly acknowledged and recorded on the day of its date in the office of the recorder of Tipton county, etc., being the county in which the said goods, etc., were then situated, and in which the mortgagees resided; that said Harlin and Boulden failed to pay said debts, and the condition of the bill of sale was broken before the issuing of the said executions or either of them; and that the lien of sale entitled the defendants, upon said forfeiture, to possession of so much of said stock of goods. Wherefore, the defendants say, as to so much of the value of said goods, etc., as was necessary to satisfy said debts, the said plaintiffs are not entitled to any judgment upon said undertaking, being the amount aforesaid.

(4) This paragraph does not present any question which at all affects the case, as it comes before us.

(5) That it is true the plaintiffs brought their action of replevin and executed the undertaking, etc., as set forth in the complaint, and that judgment was rendered against these defendants, the plaintiffs in said action. But these defendants say that the only matter, question, or issue submitted to the court upon the trial and final hearing of said action of replevin, and the only matter, question, or issue in said action which was competent and lawful for said court to try, upon the submission of said cause for trial, as shown by the record therein, was the matter, question, and issue as to the value of the property mentioned in the complaint therein, and that the title and ownership of the property and the right to the possession of said property were not, nor either of them, submitted to or tried or determined by said court in said cause. And they aver that at and before the time of the execution of said undertaking, and at the time of the said submission to trial of said matter, the said plaintiffs in that action were the owners, had the title, and were entitled to the ownership of said property and the proceeds thereof; that they were so the owners thereof and entitled to the possession thereof and to the proceeds thereof, by virtue of a mortgage made by Harlin and Boulden to them, a copy of which is alleged to be filed, and of the delivery of said goods to them, in discharge of the debts secured by said mortgage, after the execution of said mortgage upon the maturing of said debts, they not having paid said debts or any part thereof, or in any other manner than by the delivery of said property.

The paragraph then professes to make a copy of the mortgage, and a transcript of the judgment and proceedings in the action of replevin parts thereof. It is further alleged that the delivery of the said property to them by Harlin and Boulden, in pursuance of the mortgage, was before the time of the rendition of the said judgments stated in plaintiffs' complaint, or any of them, and long before the issue or service of any of said executions, and that said property was of no greater value than the amount of the debts due from said Harlin and Boulden to said Landers and others; that all the matters involved and embraced in plaintiffs' complaint herein are involved and embraced in the complaint of the defendants against the plaintiffs in this action now pending in this court, and can and must be determined in said action, and they therefore ask that this cause be consolidated, tried, etc., in and with that action. Wherefore, etc.

The plaintiffs demurred to the third and fifth paragraphs of the answer. The demurrer to the third was overruled, and that to the fifth was sustained. Reply in denial of the third paragraph of the answer.

Cause number three was commenced last in order of time, and was by the appellants against the appellees. In the complaint it is alleged that on the 15th day of January, 1869, at, etc., Harlin and Boulden were indebted to the plaintiffs, stating the amounts, and copies of the notes are alleged to be filed and made part of the complaint; that they were then the owners of the goods, etc., and mortgaged the same to the plaintiffs, and a copy of the mortgage, it is alleged, is filed, which was duly recorded, etc., on the day of its date; that afterward, in January, 1869, Harlin and Boulden delivered the goods to the plaintiffs, in pursuance of the mortgage, they having failed to pay said debts, etc., to enable the plaintiffs to sell and dispose of the same, and out of the proceeds, to satisfy their debts; that at the time of such delivery, the said goods, etc., were of no greater value than the amount of said debts of Harlin and Boulden to the plaintiffs; that the plaintiffs, in the most careful and economical manner, sold the goods and received therefor about eighteen hundred dollars, and no more; that the expenses of such sale were about one hundred and forty dollars, leaving the net sum of about sixteen hundred and sixty dollars, and no more. The dates and amounts of the judgments of the defendants are then stated, and it is alleged that on the 5th day of February, 1869, executions were issued on each of said judgments to the defendant George, then sheriff of said county, which were then levied on the said goods, etc.; that such proceedings were had that afterward, in the replevin suit, naming the parties, on the 8th day of May, 1869, these plaintiffs were ordered and adjudged to deliver said merchandise to the said George, as such sheriff, but before that time these plaintiffs had, in pursuance of their said mortgage and the delivery and transfer to them of said goods, etc., by Harlin and Boulden, fully sold and disposed of said goods, etc., as before averred. They aver that they yet have in their possession the said sum of sixteen hundred and sixty dollars, the net sum realized from the sale of said goods, which they aver belongs to them by virtue of said mortgage and transfer of merchandise to them. They allege that the lien of said executions upon said merchandise has been fully and wholly discharged, by reason of the fact that the proceeds of the same were wholly applied to pay their said mortgage, which was a lien on said goods, etc., prior to the judgments and executions of the defendants. Prayer, that the plaintiffs be adjudged the owners of the sum of money realized from the sale of said goods, etc.; that the defendants be adjudged to have no lien on the merchandise by virtue of their judgments and executions or the levy thereof; that defendants be enjoined from enforcing said judgments for the return of said merchandise, or from having any action or proceeding arising out of, or connected with said judgments, etc. The mortgage, a copy of which is filed, is in the usual form of

chattel mortgages, and in the condition or defeasance provides as follows: "Now, if the said Harlin and Boulden shall punctually pay said sum of money when the same shall become due, then the above conveyance to be void, otherwise to be in full force. The said Harlin and Boulden are to retain possession of said property until said debts become due, and upon default of payment of said money, shall deliver said property to Landers, Condit & Co. and Landers, Pee & Co., in proportion to the amount of their respective claims against said Harlin and Boulden."

The defendants in this case, appellees here, answered:

(1) A general denial.

(2) Payment by Harlin and Boulden before the suit was brought, in money and property other and different from the goods, etc., mentioned in the complaint.

(3) This paragraph was adjudged insufficient on demurrer, and need not be set out.

(4) That long before the commencement of this action, the plaintiffs, in an action by them instituted in the Tipton circuit court against Henry George, etc., claimed by their complaint to be the owners and entitled to the possession of said personal property; that the cause was put at issue; that by the record and judgment in said cause it was adjudged and determined that said goods were of the value of twenty-nine hundred dollars; that the question as to the value of said goods was in issue, and the issue was submitted to the court to find upon the evidence; that it was competent for the court to find the value of the goods in said cause, and the court did find and adjudge that said goods were of the value aforesaid; and the court further found, in said cause, that the defendant in said cause was entitled to the possession of the goods; that the plaintiffs should deliver the same to the defendant; and that, on failure to deliver the same, the defendant recover of the said plaintiffs twenty-nine hundred dollars, the value of the same. A transcript of said cause number one is made part of this paragraph of the answer. It is also alleged that the plaintiffs appealed from the said judgment to the supreme court, where the judgment was affirmed. Wherefore the plaintiffs are estopped to assert that the said goods were of any other value than said sum of twenty-nine hundred dollars, and are estopped to deny any of the facts adjudicated in said cause; and defendants say said goods were of the value of twenty-nine hundred dollars; and they deny that the said plaintiffs were the owners of said goods.

(5) That long before the commencement of this action, the plaintiffs received from Harlin and Boulden, the persons who executed to the plaintiffs said pretended mortgage, a large amount of property, notes, effects, and choses in action of the value of a thousand dollars, a more particular description of which cannot be given, which were received on account of the indebtedness of said Harlin and Boulden to the plaintiffs, mentioned in the plaintiffs' complaint, as a credit thereon. Wherefore, etc.

Demurrers to the second and fourth paragraphs of the answer were filed by the plaintiffs and overruled by the court.

The plaintiffs replied to the second and fifth paragraphs of the answer by a general denial; and to the fourth paragraph they replied, that, admitting the bringing of the action by them against said George, and that the property in that case was and is the same as that mentioned in the complaint in this case, they say that the only matter, question, or issue which it was competent for the said court to hear and decide under the submission thereof to the court, as shown by the record thereof, was as to the value of the said property, and that the title and ownership and right to the possession thereof were not, nor was either of them, submitted to or decided by the court; that at the time of the levy on said goods by said George, as alleged in the fourth paragraph, and at the time of the trial and determination of said cause, and until the same was finally sold and converted into money, as alleged in the complaint, said property and the proceeds thereof belonged to and was the property of the said plaintiffs, and they, during all of said time, were entitled to the possession thereof, by reason of the mortgage, sale, and delivery thereof to the plaintiffs by said Harlin and Boulden, as shown in the plaintiffs' complaint herein; and they say that the rights, questions, and allegations averred, stated, and set forth by them in their complaint herein were not submitted to, tried by, or heard and determined in, the action set forth in said fourth paragraph of defendants' answer or otherwise, but remain entire and undetermined; and they deny such allegations in said fourth paragraph of defendants' answer not specially herein replied to and controverted.

The said actions numbers two and three, being thus at issue, were, by agreement of the parties and the order of the court, consolidated, and the cause proceeded in the style of Landers and others v. George and others, the style of action number three. A trial was had by the court, and the court found for the defendants, assessing their damages at fifteen hundred and three dollars and thirty-seven cents. The plaintiffs moved the court for a new trial, which motion was overruled, and final judgment was rendered in favor of the defendant George, and others, for the amount of the finding.

The following are the errors assigned: (1) Sustaining the demurrer to appellants' fifth paragraph of answer to appellees' complaint on the replevin bond. (2) Refusing to permit appellants to give evidence offered at the trial by witnesses Landers and Boulden, as shown in exceptions. (3) Refusing to grant a new trial on appellants' mo-

tion and reasons. (4) In overruling appellants' demurrer to the second and fourth paragraphs of appellees' answer, in the action by appellants against appellees.

Counsel for appellants say: "The main point variously presented for consideration in this case may, we think, be stated as follows: Were the appellants, by the trial, proceedings, and judgment in the action of replevin begun by them in February, 1869, against the sheriff, Henry George, and determined in April or May, 1869, precluded from asserting in the subsequent actions, which, being consolidated and tried, are now before the court in this appeal, their title to the property in dispute and its proceeds, under their mortgage and the delivery to them by the mortgagees and owners of the property, in discharge of the debt, in accordance with the stipulations of the mortgage, before any right of appellees to the property intervened? In other words, were the questions of appellants' rights, in relation to the mortgaged property, so fully and fairly submitted, tried, and determined in the action of replevin, as that when they began this action they had no remedy to enforce their rights left to them?" Counsel for the appellees say: "It is conceded by the appellants, in their brief, that the record now before this court presents but one question, and that is, whether the judgment in the replevin suit proper concludes them as to the title, right of possession, and value of the goods in controversy."

Under this agreement as to the question presented, we do not deem it necessary to examine the case with reference to each error assigned. In the action of replevin, there were two good paragraphs of answer: (1) A general denial. (4) Property in the defendant by virtue of the levy of the executions in his hands, it being alleged that the property was the goods of the execution defendants and subject to the executions. In this condition of the issues, the cause went to the court, and we think we must hold for a full trial of the issues, notwithstanding what the clerk says in the entry as to what was to be tried. The plaintiffs had not made default, ceased to prosecute the action, or withdrawn their appearance. They were yet in court when the cause was submitted for trial, so far as anything appears. The clerk says, they failed further "to except," the cause was submitted for trial, etc. The issues must necessarily have been tried before the court could render the judgment which was rendered. The court found that the property was of the value of two thousand nine hundred dollars, that the defendant was entitled to have the property returned to him, and that the damage of the defendant, on account of the detention of the property, was one dollar. The fact that there were issues to be tried, and that the court did not limit its finding to the ascertainment of the value of the property merely, requires us to hold that there was a trial of the issues generally, and not a mere finding of the value of the property, the statement of the clerk that the trial was "as to the value of the property" to the contrary notwithstanding.

We think that we must hold, also, that the findings of the court decide the questions that the plaintiffs were not the owners or entitled to the possession of the property, as they alleged in their complaint. Necessarily, the plaintiffs must have failed to sustain their title to the property and right to its possession, or the court could not have found, as it did, that the defendant was entitled to a return of the property and damages for its detention. The fact that Landers and others had a mortgage of the goods, and that the possession of the goods had been surrendered to them, as they claim, if true, did not prevent the sheriff from levying on them and selling the equity of redemption in them. Until the mortgagee had himself, by legal notice and sale of the goods or by a judicial foreclosure and sale of them, cut off the equity of redemption, they were liable to seizure and sale by the creditors of the mortgagor. 2 Gavin & H. 240, § 436; Coe v. McBrown, 22 Ind. 252; State v. Sandlin, 44 Ind. 504. There is nothing in the mortgage in this case which vests the absolute ownership of the goods in the mortgagees on failure to pay the debt. It is provided in the mortgage that, upon default of payment of said money, Harlin and Boulden shall deliver the property to Landers and others. But we do not think that such delivery merely, if made, would free the property from the equity of redemption.

It was alleged, in the fourth paragraph of the answer of the sheriff in the replevin suit, that the property, when levied upon, was in the possession of the mortgagors, and it may be inferred that the court found this to be true, if the finding of that fact was necessary to justify the judgment for a return of the property to the sheriff. The court decided the issues in favor of the defendant the sheriff, found the value of the property, and that the defendant was entitled to a return of it. It also rendered judgment for the return, and in default of return, for the value of the property. This gave the defendant in that action as the representative of the execution plaintiffs, or in connection with them, a right of action on the bond for the amount of the damage to them, not exceeding the value of the property which the plaintiffs had so failed to return.

But appellants submit that they may allege and prove that their rights were in fact not considered and adjudicated in the case, and they refer, in support of their position, to the following cases: Cutler v. Cox, 2 Blackf. 178; Byrket v. State, 3 Ind. 248; State v. Brutch, 12 Ind. 381; Brandon v. Judah, 7 Ind. 545; Hargus v. Goodman, 12 Ind. 629, and other similar cases. We have examined these authorities and think they do

not apply to the question which is here involved. They are cases where the fact may be alleged and proved without a contradiction of the record, as to what was found and adjudged by the court. Here, as we have already said, the record must be regarded as showing a determination of the ownership and right to the possession of the property, and to allow an averment and proof to the contrary would be to allow the record to be impeached and contradicted, and that, too, in a proceeding in which the record is used merely to establish a fact found, and where it is attacked collaterally.

Counsel for appellants urge that there was no consent of their clients to the trial of any question in the case without a jury, except as to the value of the property. We have already said that we regard the other facts in the record as overruling the statement of the clerk in his entry, that the trial was to ascertain the value of the property only. The plaintiffs were in court and made no objection to the mode of trial, to the finding of the court, or to the judgment rendered. When they brought the case to this court on appeal, they made no such objection, and the judgment was in all things affirmed. If the clerk's entry should be regarded as stating the fact, still, when the court went beyond what was submitted and made a finding of other matters, and rendered judgment thereon, the plaintiffs should have made the objection then in some proper way, and if the error was not corrected there, the point should have been urged on appeal to this court. The record of the finding and judgment cannot now, in a collateral proceeding, be varied, amended, or contradicted. If there was any error in the finding or judgment, it is only an error, and does not at all affect the judgment while it remains unreversed. In favor of the conclusiveness of the finding and judgment, as evidenced by the record, we may cite Fischli v. Fischli, 1 Blackf. 360, Day v. Vallette, 25 Ind. 42, Crosby v. Jeroloman, 37 Ind. 264, and Carr v. Ellis, 37 Ind. 465, and cases cited.

It is clear that the answers of the appellants, in the action on the replevin bond, admitting as they do, that they did not prosecute the action of replevin with effect and without delay, and that, although they were ordered to do so, they did not return the property to the sheriff, can be no bar to that action. Brown v. Parker, 5 Blackf. 201; Sherry v. Foresman, 6 Blackf. 56; Wallace v. Clark, 7 Blackf. 298; Davis v. Crow, Id. 129; Hutton v. Denton, 2 Ind. 644; O'Neal v. Wade, 3 Ind. 410. The judgment is affirmed, with costs.

BUSKIRK, C. J. I dissent from the foregoing opinion and judgment.

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